REDACTED – FOR PUBLIC INSPECTION

HWG | HARRIS, WILTSHIRE & GRANNIS LLP

June 23, 2017

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Business Data Services in an Internet Protocol Environment; Technology Transitions; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services; WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25 & RM-10593

Dear Ms. Dortch:

Pursuant to the Commission's June 24, 2016 *Order* ("*June 24 Order*"), which "extends the procedures for submitting and accessing Confidential Information adopted in the business data services protective orders in WC Docket No. 05-25 to Confidential Information filed in the record in WC Docket No. 16-143,"[1] Windstream Services, LLC, Ad Hoc Telecom Users Committee , BT Americas, Inc., and INCOMPAS hereby submit a highly confidential version of the attached letter, which contains highly confidential information protected under the following protective orders adopted by the Commission:

- *Modified Protective Order*[2] in WC Docket No. 05-25, RM-10593
- *Second Protective Order*[3] in WC Docket No. 05-25, RM-10593
- *Data Collection Protective Order*[4] in WC Docket No. 05-25, RM-10593

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1 *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, and 05-25, RM-10593, Order, DA 16-722 (rel. June 24, 2016).

2 *See Special Access Rates for Price Cap Local Exchange Carriers*, Modified Protective Order, DA 10-2075, 25 FCC Rcd. 15,168 (Wireline Comp. Bur. 2010).

3 *See Special Access Rates for Price Cap Local Exchange Carriers*, Second Protective Order, DA 10-2419, 25 FCC Rcd. 17,725 (Wireline Comp. Bur. 2010) ("*Second Protective Order*").

4 *See Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Data Collection Protective Order, DA 14-1424, 29 FCC

- *Business Data Services Data Collection Protective Order*[5] in WC Docket Nos. 15-247 & 05-25, RM-10593
- *Tariff Investigation Protective Order*[6] in WC Docket Nos. 15-247 & 05-25, RM-10593
- *Second Protective Order* in GN Docket No. 13-5

Highly confidential treatment of the respectively marked portions of the attached document is required to protect information subject to the above-mentioned protective orders, including information regarding:

- "Pricing, to the extent such information is not publicly available, for . . . all [packet-switched data services]";[7]
- "Expenditures, including dollar volumes of purchases of intrastate and interstate DS1 and DS3 services, and expenditures under certain rate structures and discount plans";[8]
- "Descriptions of CLEC . . . sales, pricing structures and discounts"[9]

The marked information is not available from public sources, and, "if released to competitors, would allow those competitors to gain a significant advantage in the marketplace."[10]

In accordance with the protective orders in WC Docket No. 05-25, extended to WC Docket No. 16-143 by the *June 24 Order*, Windstream Services, LLC, Ad Hoc Telecom Users Committee, BT Americas, Inc., and INCOMPAS, in addition to filing this redacted version electronically via ECFS, will submit one original and two hardcopies without redaction to the Secretary's Office. Windstream Services, LLC, Ad Hoc Telecom Users Committee, BT

Rcd. 11,657 (Wireline Comp. Bur. 2014) ("*Data Collection Protective Order*"). *See also Public Statements Derived from Highly Confidential Data Filed in Response to the Business Data Services (Special Access) Data Collection*, Public Notice, DA 16-368, 31 FCC Rcd. 3420 (2016) (clarifying the confidential treatment of data derived from the data collection).

5 *See Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Protective Orders, DA 15-1387, 30 FCC Rcd. 13,680, App. A (Wireline Comp. Bur. 2015).

6 *See id.* App. B ("*Tariff Investigation Protective Order*").

7 Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, DA 12-199, 27 FCC Rcd. 1545, 1548 (Feb. 13, 2012) (supplementing the *Second Protective Order*) ("*Second Supplement to Second Protective Order*").

8 *Id.*

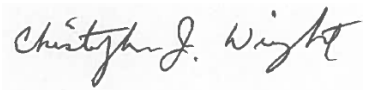
9 *Id.*

10 *Second Protective Order* ¶ 3; *First Supplement to Second Protective Order* at 6571; *Second Supplement to Second Protective Order* at 1546; *Data Collection Protective Order* ¶ 5.

Americas, Inc., and INCOMPAS will also submit one copy without redaction to Christopher Koves, Pricing Policy Division, Wireline Competition Bureau.

Please contact me if you have any questions or require any additional information.

Sincerely,



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REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Special Access Rates for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

MOTION FOR STAY PENDING JUDICIAL REVIEW

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June 23, 2017

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INTRODUCTION AND SUMMARY

The Commission should stay the effective date of the rules it adopted in the order on review (the "*Order*") pending judicial review.[1] The standard for a stay is met here, where the petitioners will present substantial questions to the court of appeals, and the equities also favor the grant of a stay. If not stayed, the rules will take effect on August 1. Petitioners will treat Commission inaction on this stay request as a denial on June 30.

As the Commission knows, the business data service ("BDS") market generates $45 billion in revenues annually. The record shows that the incumbent local exchange carrier ("ILEC") is the only facilities-based BDS provider in 86 percent of buildings with total bandwidth demand of up to and including 50 Mbps. That is because it is almost never economically feasible to build a new last-mile connection to provide service at these lower bandwidths. Therefore, competitors must buy last-mile connections from the ILECs in order to compete with ILECs in the provision of both BDS, and communications solutions that use BDS connections as critical wholesale inputs. In addition, competitors often need to buy dedicated transport from ILECs in order to reach the competitors' high-capacity transport networks, because the many locations served only by an incumbent channel termination frequently lack direct access to competitive transport facilities.

To address ILECs' historic dominance of this marketplace, the Commission has for decades employed tariffs and price cap regulation to ensure just and reasonable BDS rates. After experimenting with pricing flexibility rules for many years, the Commission in 2012 concluded that the triggers it had previously adopted to lift price caps in certain areas swept too broadly by

[1] *Business Data Services in an Internet Protocol Environment et al.*, Report and Order, FCC 17-43, WC Docket Nos. 16-143 et al. (rel. Apr. 28, 2017) ("*Order*").

deregulating entire Metropolitan Statistical Areas ("MSAs") based on unreliable proxies for the presence of competition that measured a competitor's sunk investment in the MSA rather than actual or potential entry into the BDS market.[2] Accordingly, in 2016, the Commission proposed to replace the overbroad MSA-based triggers for both channel terminations and transport with a new competitive market test ("CMT") for both channel terminations and transport.[3] The Commission proposed to develop the CMT using "traditional economic principles"[4] to more rigorously and more specifically identify geographic and product markets where competition was sufficient to forgo price cap regulation.

The new administration then abruptly changed course without seeking further comment. Rather than devising an improved test to distinguish competitive from non-competitive areas with greater precision, the Commission adopted results-driven new rules divorced from well-established market analysis principles, precedent, and its own proposal.

For DS1 and DS3 channel terminations, the *Order* concludes that there is sufficient competition if, at a location with BDS demand, there is *one* incumbent and *one* so-called "nearby competitor" that the Commission asserts could compete with that incumbent in a period of three to five years.[5] This conclusion is the basis of a new CMT for DS1 and DS3 channel terminations. The new CMT deems an entire county to be sufficiently competitive to eliminate price cap regulation if either of two prongs are satisfied: (1) when 50 percent of locations with

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[2] *Special Access Rates for Price Cap Local Exchange Carriers et al.*, Report and Order, 27 FCC Rcd. 10557 (2012) ("*Suspension Order*").

[3] *Business Data Services in an Internet Protocol Environment et al.*, Tariff Investigation Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd. 4723 (rel. May 2, 2016) ("*FNPRM*").

[4] *FNPRM* ¶ 280.

[5] *Order* ¶¶ 13, 120.

BDS demand for circuit-based DS1 and DS3 end-user channel terminations are within a half mile of a building served by a competitive provider; or (2) if 75 percent of census blocks in the county have a cable provider serving residential customers over coaxial connections. In so doing, the Commission deregulates more than 90 percent of the locations with BDS demand,[6] turning its back on modern antitrust analysis, upending decades of established precedent, and ignoring extensive record evidence.

For dedicated transport services, the Commission declined to adopt a CMT at all, and instead deregulates the market nationwide. To create the illusion of robust transport competition, the Commission conducted a fatally flawed competitive analysis based on a fundamental miscomprehension of transport network architecture—an error that the public has no opportunity to correct, because the Commission never proposed to conduct that analysis.

The extensive deregulation that will result if the new rules take effect will permit the incumbents to squeeze their competitors by raising prices for essential inputs to their services. It also would cause substantial harm to businesses, especially smaller businesses in suburban and rural areas that rely on access to BDS at or below 50 Mbps, as acknowledged by the U.S. Small Business Administration. And the *Order* will allow ILECs to de-tariff their BDS services on August 1, 2017, and to replace discontinued BDS with higher-cost alternatives, creating the prospect of enormous disruption and uncertainty as the industry migrates to a new paradigm of Commission indifference to competition.

As the attached declarations show, the economic losses that businesses and competitive carriers will suffer if the rules take effect would be massive, imminent, and unrecoverable. A

[6] *Id.* ¶¶ 141–42.

stay pending appeal will serve the general public, who under the *Order* will be condemned to suffer the usual results of monopoly markets: higher prices, less output and lower quality. By contrast, maintaining the status quo will harm no one. Incumbents have been operating under the price cap regime for many years, and currently benefit from their ability to charge excessive rates to businesses and carriers that lack competitive options in areas previously and improperly deregulated.

As a result, Petitioners meet the requirements for a stay. They are likely to succeed on review of the merits of the Commission's clear defiance of notice-and-comment requirements, and violation of established principles of reasoned decision-making. Moreover, a stay would not harm the ILECs, and instead would avoid massive and permanent losses that would be unrecoverable in the event of reversal, while serving the public interest.

BACKGROUND

I. REGULATORY HISTORY OF BDS

A. Rate Regulation and Tariffing Requirements

ILECs have been subject to price cap regulation since 1990, and to other forms of rate regulation prior to that year.[7] ILECs also have long been subject to tariffing requirements (i.e., the requirements that they sell BDS to all customers on common rates, terms, and conditions published in a public schedule). These regulations apply exclusively to TDM-based BDS.

[7] *See Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786, 6788 ¶¶ 6-8 (1990). Some ILECs are subject to rate-of-return rather than price cap regulation.

Ethernet-based BDS is currently unregulated, even when provided by the incumbent, due to grants of regulatory forbearance provided by the Commission.[8]

B. Pricing Flexibility in Competitive Areas

The Commission has worked to free ILECs from these price cap and tariffing requirements in areas where competition adequately constrains ILEC rates, terms, and conditions. As the Commission has found, BDS entry conditions that determine whether a competing provider can viably serve a new location in response to monopolist rates charged by the incumbent differ dramatically across even small geographies.[9]

Recognizing that entry in the BDS market can occur in some places but not others, the Commission established "pricing flexibility" rules in 1999. These rules allowed ILECs to petition for deregulation in MSAs that satisfied certain "triggers" designed to predict the availability of competition based on the number of competitors with "sunk investment" in an MSA.[10] The Commission predicted that the presence of sunk investment in parts of an MSA

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[8] *See Order* ¶ 7 & n.24; *see also Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order, 12 FCC Rcd. 8596 (1997) (forbearing from dominant carrier regulation for non-ILEC BDS).

[9] *Suspension Order* ¶ 36 ("Our review of the evidence suggests that demand varies significantly within any MSA, with highly concentrated demand in areas far smaller than the MSA. This leads us to conclude that competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand throughout an MSA, regardless of whether the MSA also contains areas with demand at sufficient levels to warrant competitive entry.").

[10] *Access Charge Reform et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, 14224 ¶¶ 77-83. If the ILEC established that an MSA met the trigger for "Phase I" pricing flexibility, the Commission would allow the ILEC to sell BDS through individually negotiated contract tariffs rather than public tariffs in that MSA. If the trigger for "Phase II" pricing flexibility was met, the ILEC could sell BDS through contract tariffs *and* at unregulated rates in the relevant MSA.

would lead to robust competitive entry throughout the MSA.[11]

The Commission and the industry soon realized that this prediction was incorrect, and that the 1999 pricing flexibility triggers were flawed. In 2005, the Commission commenced a rulemaking proceeding seeking comment on whether the pricing flexibility rules accurately predicted competition, among other issues.[12] In 2012, the Commission concluded that the triggers "are not working as predicted," and suspended grants of pricing flexibility, thereby preventing ILECs from achieving further unwarranted deregulation in additional MSAs.[13] More specifically, the Commission found that MSAs "do not reflect the actual scope of competitive entry," because BDS "demand varies significantly within any MSA, with highly concentrated demand in areas far smaller than the MSA," and because "competitive entry is considerably less likely to be profitable and hence is unlikely to occur in areas of low demand throughout an MSA, regardless of whether the MSA also contains areas with demand at sufficient levels to warrant competitive entry."[14] Accordingly, the Commission initiated a data collection to help it generate more accurate and less overbroad findings of competition.[15]

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[11] *Id.*

[12] *Special Access Rates for Price Cap Local Exchange Carriers et al.*, Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (2005).

[13] *Suspension Order* ¶ 1 (noting that the triggers "are not working as predicted" and the "widespread agreement across industry sectors that these rules fail to accurately reflect competition in today's special access markets").

[14] *Id.* ¶ 36.

[15] *Special Access Rates for Price Cap Local Exchange Carriers et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 16318 (2012).

C. The *FNPRM*

In the *FNPRM*, the Commission provided the public with the results of a competition analysis conducted using the BDS data it had collected. Based on that analysis, the Commission found that BDS competition remains "stubbornly absent," especially at DS1- and DS3-level bandwidths (i.e., less than 45 or 50 Mbps).[16]

First, the Commission observed that *actual* BDS competition is practically non-existent in the BDS marketplace. 77 percent of all BDS customer locations are served exclusively by the ILEC.[17] According to the same data, 86 percent of locations with aggregate BDS bandwidth demand of 50 Mbps or below —i.e., DS1- or DS3-levels—are served by the ILEC alone.[18] Approximately 99 percent of such locations are served by at most a BDS duopoly.[19]

The Commission then addressed the issue of *potential* competition—whether, in the vast majority of locations without BDS competition, the possibility that a new, competing provider would enter the market is sufficient to deprive the incumbent of market power. The Commission found direct evidence in BDS pricing data establishing that ILECs exercise market power at DS1- and DS3-level bandwidths, corroborating substantial record evidence that, even in the face

[16] *FNPRM* ¶ 3.

[17] *Id.* ¶¶ 217–18.

[18] Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, at 3, WC Docket Nos. 16-143 et al. (filed Oct. 21, 2016) (showing that based on the Commission's data, more than 86 percent of buildings that have aggregate demand of less than 50 Mbps have no competitive provider).

[19] *Id.* at 5.

of higher prices, economic conditions will rarely, if ever, justify the construction of new facilities to serve lower bandwidth customers.[20]

Based on this understanding of BDS competition, the Commission proposed a remedy: a CMT that would use traditional competition principles to define geographic and product markets to generate more granular and accurate competition findings than the suspended pricing flexibility triggers. The Commission proposed to apply the CMT at the level of the census block, and sought comment on using the more granular individual building location.[21] The Commission explicitly stated that its goal was "to learn from past experiences and to not repeat the errors of the 1999 pricing flexibility regime by granting relief too broadly to cover areas where competition is not present or unlikely to occur."[22] The Commission also explicitly stated that the CMT would apply to both channel termination and dedicated transport elements of a TDM-based BDS circuit.[23]

D. The *Order* under Review

Instead of targeting deregulation more precisely than the suspended pricing flexibility triggers, the *Order* reverses course completely—and dismantles the BDS price cap regime almost entirely.

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[20] *Id.* ¶¶ 238 ("[C]ompetitive supply in a unique location is correlated in both statistically and economically significant ways with lower ILEC prices for DS1s and DS3s at that location.").

[21] *Id.* ¶ 289.

[22] *Id.* ¶ 290.

[23] *Id.* ¶ 278 ("Therefore, we propose to abandon the collocation-based competition showings for channel terminations and other dedicated transport services for determining regulatory relief for ILECs. Instead, we propose to apply a new Competitive Market Test.").

For channel terminations, the *Order* adopts a two-pronged CMT applied across counties using vastly over-inclusive proxies for measuring the presence of competition. Each prong produces positive findings for competition, and therefore eliminates price caps for channel terminations, in more than 90 percent of locations across the country—amplifying the flaws of the suspended pricing flexibility triggers. And even some of the remaining 10 percent continue to be unregulated, because even where this CMT deems a county non-competitive, the Commission declines to apply price cap regulation if the county was previously deregulated under the flawed MSA-based test.

For dedicated transport, the *Order* completely discards the Commission's prior proposal to adopt a CMT. Instead, it deregulates and eliminates price caps for these services on a nationwide basis.[24]

The *Order* also eliminates ILEC tariffing requirements on August 1, 2017, the day the rules become effective. Moreover, for both competitive and non-competitive counties, the *Order* sunsets an interim rule requiring ILECs that discontinue wholesale TDM-based BDS to offer wholesale access to replacement services on reasonably comparable rates, terms, and conditions.[25] If the sunset takes effect, ILECs would be able to stop selling price capped BDS services and force their customers to switch to unregulated, and higher-priced, alternatives.

STANDARD

The Commission applies the D.C. Circuit's four-factor test when evaluating petitions to stay the effective date of a Commission rule. Under that test, a petitioner must establish that (1)

[24] *Id.* ¶¶ 90–93.

[25] *See Order* ¶ 288.

it is likely to prevail on the merits; (2) it will suffer irreparable harm absent preliminary relief; (3) other parties will not be harmed by the stay; and (4) the public interest would favor a stay.[26]

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

A. The *Order* Contravenes Traditional Competition Principles and Judicial, DOJ, FTC, and Commission Precedent.

In the *Order*, the Commission concludes that in the high sunk cost BDS marketplace, sufficient competition is present if, in the appropriate geography, there is *one* incumbent and *one* so-called "nearby competitor" that the Commission asserts could compete with that incumbent in a period of three to five years.[27] In so doing, the Commission deregulates more than 90 percent of the locations with BDS demand,[28] turning its back on modern antitrust analysis, upending decades of established precedent, and ignoring record evidence. Moreover, the Commission's failure even to apply its own newly-minted standard in a consistent manner demonstrates that the agency has entirely failed to construct a reasonable standard for distinguishing where a lack of competition warrants the traditional use of price regulation to prevent supra-competitive pricing.

1. The *Order* Defines a "Competitive Market" To Include Geographic Areas Where, by Established Standards, Only the ILEC Provides BDS.

The Commission's CMT sets forth two independent prongs, neither of which is sufficient to assess whether actual BDS competitors will provide service to a geographic area in a reasonable amount of time necessary to discipline the ILEC's pricing.[29] Specifically, the CMT

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[26] *See Rates for Interstate Inmate Calling Serv*ices, 31 FCC Rcd. 10936 ¶ 9 (2016).

[27] *Order* ¶¶ 13, 120.

[28] *Id.* ¶¶ 141–42.

[29] For purposes of this motion only, petitioners do not challenge the Commission's use of a standard that draws regulatory lines that may not be accurate in 100 percent of locations; rather petitioners challenge the CMT because the Commission applies it to competitive standards that

treats a particular county as competitive, sufficient to forgo price regulation, if (i) 50 percent of locations with demand for circuit-based DS1 and DS3 end-user channel terminations are within a half mile of a building served by a competitive provider; or (ii) 75 percent of census blocks have a cable provider present. The *Order*'s administrable framework for price regulation is based on the Commission's unfounded and unwarranted predicate conclusion that sufficient competition exists where there is a nearby "competitor," which it defines as either one competitive provider with a network within a half mile of a location served by an ILEC or a cable operator's facilities in the same census block as a location with BDS demand.[30] In neither case does the Commission require even one firm to occupy the same position as the incumbent—namely to be physically present in the building with similar costs for supplying service—and in the case of cable it does not require the firm to be providing BDS at all in the relevant geography. These failings violate well-established competition principles in defining the geographic market and assessing whether a non-market entity will make a timely entry into the market.

a. The Order Defines a Geographic Market That Fails to Serve Its Intended Purpose—To Identify Practical Choices Available to Customers.

The relevant question in defining an appropriate geographic market is to consider the area within which customers can practically turn to alternative sources and within which providers can reasonably compete.[31] This is critical to the Commission's CMT because—as it explains—it defines the geographic market to identify where competition does and does not exist and,

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are not capable of producing a reasonable fit between rule and outcome. The Commission's stated goal of deregulation is only in areas where "local markets are sufficiently competitive . . . ." *Order* ¶ 130.

[30] *Order* ¶ 117.

[31] *Id.* ¶ 39 (citing *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994)).

therefore, where price regulation is unnecessary and where it is needed to guard against supra-competitive ILEC pricing.[32]

But without explaining why such a departure is warranted with the rigor demanded by the Administrative Procedure Act ("APA"),[33] the Commission ignores traditional competition principles and its own precedent,[34] by concluding that a second nearby "competitor" is in the market for competitive analysis purposes.[35] The 2010 Horizontal Merger Guidelines, relied on elsewhere by the Commission, limit market participants in a specified geography to firms that (i) currently earn revenues in the relevant market, (ii) have committed to making competitive offerings in the near future, or (iii) who can enter rapidly (i.e., "rapid entrants").[36] But neither of the types of "competitors" identified by the *Order*'s CMT fits these criteria. The Commission *expressly disclaims* that a second wireline provider within a half mile—the hypothetical

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[32] *Id.* ¶ 130 (describing the CMT as the "methodology that we will use to determine which local markets are sufficiently competitive to warrant deregulation . . . .").

[33] *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015) (Before adopting a policy that "'rests upon factual findings that contradict those which underlay its prior policy,'" the Commission has to confront its prior findings and "provide [a] more substantial justification" than would be required absent the conflicting prior policy) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

[34] *See, e.g., SBC Communications Inc. and AT&T Corporation Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, 18307 ¶ 28 (2005) ("SBC AT&T Memorandum Opinion and Order") ("Consistent with Commission precedent and the record before us, we conclude that the relevant geographic market for wholesale special access services is a particular customer's location."). The Commission analysis rather confusingly discusses examples of where cable companies are already competing for BDS business or are describing how to do so, *Order* ¶¶ 118, n.360, 119, but, of course, this is all irrelevant to the actual terms of the CMT, which expressly do not require present-day competition.

[35] *Order* ¶ 39.

[36] DOJ and FTC, *Horizontal Merger Guidelines* § 5.1 (2010) ("2010 Horizontal Merger Guidelines").

competitor under the CMT's first prong—is a rapid entrant.[37] And the Commission never contends that cable "competitors" under the CMT's second prong are actually in the market. Nor could it given that cable companies qualify as "competitors" even if they do not offer BDS in the relevant geography; the only requirement is that the cable operator provide *best efforts* broadband to *residential* customers.

The only option left is for the Commission's nearby so-called "competitor" to have committed to entering the market in the near future.[38] But, like Einstein's spaceship racing to the speed of light, the Commission stretches time beyond all earthly recognition. Failing to consider key evidence, the Commission surmises that "over a period of several years, such a provider will in most cases place reasonably effective competitive pressure on the incumbent."[39] But the application of this to cable ignores undisputed evidence provided by the cable industry itself that cable operators will not and cannot commit to using their cable networks to provide BDS in *any* significant quantity, let alone with the ubiquity assumed by the Commission's test. As the cable operators warned the Commission repeatedly throughout the proceeding, offering BDS over coaxial facilities would absorb vast amounts of limited network capacity that cable companies need to reserve for their core residential TV, phone, and Internet lines of business.[40]

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[37] *Order* ¶ 120 n.368.

[38] 2010 Horizontal Merger Guidelines § 5.1.

[39] *Order* ¶ 120 n.368.

[40] *See, e.g.*, Comments of the National Cable & Telecommunications Association at 29, WC Docket Nos. 16-143 et al. (filed June 28, 2016) ("NCTA June 28, 2016 Comments") ("The Commission's assumption that cable company HFC networks are ubiquitously deployed for BDS purposes reflects a fundamental misunderstanding of how these networks operate."); *id.* ("HFC plant is a shared network with limited capacity, particularly upstream capacity, which requires cable companies to carefully allocate bandwidth among their entire customer base, including residential broadband customers . . . . What this means in practice is that, notwithstanding an existing HFC network presence, it may well not be feasible to provide BDS-level services in

The requirement that prospective entry be timely is essential to an appropriately-defined geographic market because it guards against a firm harvesting monopolist prices merely on the suggestion—increasingly uncertain the longer it stretches toward the future—that someday competition will arrive.[41] To sacrifice present-day competition because of some hypothesized but indefinite future entry is unacceptable, which is why contrary to the *Order*, the antitrust agencies have concluded that a "competitor" that may arrive "over three to five years,"[42] is not a

many places due to the limited capabilities of the HFC plant."); Comments of Comcast Corporation at 31, WC Docket Nos. 16-143 et al. (filed June 28, 2016) ("Comcast June 28, 2016 Comments") (explaining that EoHFC has "limited relevance to the BDS marketplace" because it "represents a very small segment of the market with little potential for significant growth"); Reply Comments of Charter Communications, Inc. at 5, WC Docket Nos. 16-143 et al. (filed Aug. 9, 2016) ("Although some commenters suggest that cable providers' hybrid fiber coaxial ('HFC') networks allow them nearly ubiquitous access to business customers, that is simply incorrect."); Comments of the American Cable Association at 28, WC Docket Nos. 16-143 et al. (filed June 28, 2016) ("ACA June 28, 2016 Comments") (offering dedicated bandwidth to a business customer would "subtract[] from the available shared . . . capacity" for the industry's core residential video and broadband business); Comments of Cox Communications, Inc. at 16–17, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (explaining that "the more 'dedicated' bandwidth is sold as EoHFC, the less bandwidth 'headroom' is available for all of the mass market and small businesses sharing the network and who generate substantially more revenue than EoHFC services," and that electronics upgrades will not resolve such capacity constraints).

[41] *See United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 622 (1974) (holding that "in a potential-competition case like this one, the relevant geographic market or appropriate section of the country is the area in which the acquired firm is an actual, direct competitor" and rejecting expansion of the geographic market from the Spokane area to the entire state, where the acquired firm only operated in Spokane).

[42] *Order* ¶ 13.

timely entrant.[43] Indeed, the Commission's own precedent makes this point plain[44] and in the height of irony, so does its *own experience* with BDS. After thirteen years of waiting for "sunk investment" to result in widespread actual entry, the Commission conceded that its 1999 pricing flexibility triggers were wrong. And less than one year after committing to fix its 1999 test, the Commission has decided to set policy based on a flawed prediction of entry yet again.

b. The Commission's Attempt to Construct a New Standard for When a Nearby "Competitor" is in the "Market" Fails to Satisfy Basic Economic Principles and Established Competition Analysis.

In an effort to salvage the *Order*'s flawed competitive market standard, the Commission asserts that there are buildout incentives in the BDS industry that justify a departure from the traditional approach to geographic market definition. But even if buildout (and thus entry to a

[43] *See* 2010 Horizontal Merger Guidelines § 9.1; *see also F.T.C. v. Staples, Inc.*, 190 F. Supp. 3d 100, 133 (D.D.C. 2016) ("The relevant time frame for consideration in this forward looking exercise is two to three years."); *United States v. Bazaarvoice, Inc.*, 2014 WL 203966, at *70 n.19 (N.D. Cal. Jan. 8, 2014) ("The Court agrees that two years is an appropriate time-frame in this case. Entry within two years is likely to undo the anticompetitive effects created by the merger such that the merger would be unprofitable, whereas entry beyond two years is not."); *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 73 n. 28 (D.D.C. 2011) ("For entry to be considered timely, it typically must occur within approximately two years post-merger."); *F.T.C. v. ProMedica Health Sys., Inc.*, 2011 WL 1219281, at *31 (N.D. Ohio Mar. 29, 2011) (noting that entry was not timely where "[i]t would take significantly longer than the two-year timeframe prescribed by the [2010] *Merger Guidelines*" to build a new hospital). Moreover, as a leading antitrust treatise has noted, the 2010 Horizontal Merger Guidelines shifted focus from whether competition will develop in the future to whether there have been recent examples of new entrants. *See* 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* § 941g (4th ed. 2016).

[44] *See, e.g.*, *Application of EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp and EchoStar Communications Corp.*, Hearing Designation Order, 17 FCC Rcd. 20559, 20616 ¶ 140 (2002) ("2002 Hearing Designation Order") (requiring entry to be within two years in order to make a significant market impact); *Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services*, Report and Order, 10 FCC Rcd. 7842, 7847 ¶ 22 (1995) ("Under the case law potential entry must be reasonably prompt, a typical period being two years from the present in order to expect a significant impact on existing competitors . . . .").

building) were timely (which it is not), the Commission's analysis fails to satisfy the well-established standards for determining whether buildout is likely—namely, whether it is economically sensible to expect the investment necessary for a competitor to complete the buildout within an acceptable timeframe.

The *Order* concludes that wherever ILEC prices are high enough, investment will inevitably follow because the expected revenue will be more than the necessary investment.[45] But established antitrust precedent asks more; it seeks to understand whether entry is "sufficient to deter or counteract the competitive effects of concern,"[46] otherwise deregulation would simply be a recipe for monopoly abuse. To the extent that the Commission is arguing that the presence of other companies within a half mile of the incumbent,[47] such that their presence "on the wings" exerts competitive pressure, the Commission must show that (1) the market is "highly concentrated," that (2) the company is "perceived by existing firms in the market as a potential independent entrant," and that (3) the company "has exercised a tempering impact on the competitive conduct of existing sellers."[48] The Commission wholly fails to conduct this analysis and thus is in no position to weigh future outcomes against current anticompetitive effects. And even on its own terms of assessing the incentive to build out, the Commission fails to ask, even at a level of generality normally employed in a rulemaking: What are the revenue opportunities? What is the likelihood that customers will actually sign up (especially important given the ILEC

[45] *Order* ¶ 119.

[46] 2010 Horizontal Merger Guidelines § 9.3.

[47] *See, e.g.*, *Order* ¶ 50 ("buildout or *even its threat* would be timely enough to restrain a dominant provider") (emphasis added).

[48] *Tenneco, Inc. v. FTC*, 689 F.2d 346, 355 (2d Cir. 1982).

historic tactic of cutting prices where entry occurs while keeping prices artificially high where it does not)?[49] What are the costs of building out? Will the investment have other use if the sales are not made after investment has been made?

Instead, the Commission assumes that high sunk network costs will incent providers to build laterals to as many customers as possible because the incremental cost of a lateral is much lower than the cost of other network facilities.[50] But such assumptions do not mesh with the market realities of the BDS industry documented in this proceeding, where a nearby "competitor" faces substantial impediments in serving an additional location, including, most importantly, the *additional* costs required for network extension and customer connection (e.g., the costs to build a lateral and install electronics on the connections).[51] A nearby "competitor" may also experience impediments to buildout when the building owner refuses to grant the provider access or charges a high access fee, or when it is difficult or costly to obtain rights of way to a specific building (e.g., pole access or costs of burying lines).[52] In fact, one of the

[49] *See MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081, 1099 (7th Cir. 1983) (describing how AT&T systematically lowered rates where MCI had entered to compete and raised rates where MCI had not entered).

[50] *Order* ¶ 54.

[51] *See* Declaration of Dan Deem, Douglas Derstine, Mike Kozlowski, Arthur Nichols, Joe Scattareggia, and Drew Smith ¶ 51, appended as Attachment A to Comments of Windstream Services, LLC, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr. 21, 2016) ("Windstream June 28, 2016 Comments"); Comments of TDS Metrocom, LLC at 20, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016); Declaration of James Butman on Behalf of TDS Telecommunications Corporation ¶ 12, appended to Letter from Thomas Jones, Counsel for TDS Telecommunications Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 et al. (filed Mar. 26, 2015); Reply Comments of Birch, BT Americas, EarthLink, and Level 3 at 4–11, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016).

[52] Declaration of Jonathan B. Baker on Market Power in the Provision of Dedicated (Special Access) Services ¶¶ 39-40, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (refiled Apr.

authorities cited by the Commission recognizes exactly that: "[L]inking those last-mile connections through a wired distribution network, is a costly endeavor."[53]

And it is even worse for cable. The Commission likes the notion that entities will have a greater incentive to invest where they face high sunk costs,[54] and the Commission limits its definition of sunk costs to an "investment that has no value in an alternative use."[55] Yet the Ethernet-over-Hybrid Fiber-Coaxial Cable ("EoHFC") facilities that meet the second prong of the CMT are not "sunk" in that sense; they are valuable precisely because they are being used to provide a host of residential data, video programming, and voice services that represent cable operators' core business.[56] Indeed, a cable operator "may want to deploy as many new services as possible since there exists a significant scope economy."[57] Regardless, cable cannot sell EoHFC in any significant quantity, because the capacity used by such services is shared with—and would swamp the necessary industry capacity to provide—core residential TV, Internet, and phone service.

14, 2016) ("Baker Declaration"); Declaration of David Schirack and Mike Baer ¶ 18, appended as Attachment A to Windstream June 28, 2016 Comments ("Schirack/Baer Declaration").

[53] Organization for Economic Co-operation and Development, *The Development of Fixed Broadband Networks* 11 (2015), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP/CISP(2013)8/FINAL&docLanguage=En (*see Order* ¶ 120 n.370).

[54] *Order* ¶ 120 n.370; *see id.* ¶¶ 120–21.

[55] *Id.* ¶ 127 n.392.

[56] *See* ACA June 28, 2016 Comments at 28 (explaining that "dedicating HFC bandwidth to BDS subtracts from the available shared network capacity" for residential video and broadband services).

[57] *See* Mingzhe Tang, *Diversification of Cable Television Firms into Broadband Products*, 35 Telecomm. Pol'y 951, 953 (2011).

Most fundamentally, however, the Commission fails to consider the economic value of the demand associated with the low bandwidth DS1s and DS3s that are the subject of the CMT. While low bandwidth connections are numerous, they generate substantially lower revenue than high bandwidth counterparts.[58] As participants in the rulemaking emphasized to the Commission repeatedly, there was substantial record evidence, including an economic model developed by CostQuest,[59] documenting that buildout would be infeasible at DS1 and DS3 bandwidths because of the low anticipated revenues.[60] The Commission fails to address the bulk of this evidence in the *Order*. It notes only the CostQuest model—and then summarily dismisses it in a footnote.[61]

[58] The Commission summarily dismisses in a footnote the cost study conducted by Windstream as not persuasive. *Order* ¶ 119 n.363.

[59] CostQuest White Paper #1 at 2, appended as Attachment A to Letter from Jennie B. Chandra, Vice President of Public Policy and Strategy, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 et al. (filed June 8, 2015) ("CostQuest White Paper") ("[A]n economically rational CLEC will not self-deploy to serve a single customer with less than 1 Gbps of capacity per building even if [the] building offers a more attractive option than wholesale lease payments . . . because the revenue hurdle is higher than the cross-over point in the build-versus-buy analysis.").

[60] Declaration of John Merriman on Behalf of Level 3 Communications, LLC ¶ 6, appended to Comments of Birch, BT Americas, EarthLink, and Level 3, WC Docket Nos. 16-143 et al. (filed June 28, 2016) (noting that it is "infrequently the case that Level 3 can deploy a new fiber connection to serve a customer demanding only 100 Mbps of bandwidth or below . . . because the distance between a customer location and a splice point . . . usually exceeds the construction feasibility limits"); Reply Comments of TDS Metrocom, LLC at 2, 15, WC Docket No. 05-25, RM-10593 (filed Feb. 19, 2016) ("[A] fiber lateral build to any customer located 100 to 1,000 feet from the nearest splice point on TDS CLEC's fiber network is not competitive at speeds ranging from 10 to 100 Mbps because TDS CLEC could not recover its required revenue and compete with lower RBOC retail rates."); Schirack/Baer Declaration ¶ 16 ("[A] single 100 Mbps circuit almost never generates the amount of revenue required to justify deployment of a new last-mile connection by its competitive carrier operations, even when Windstream has already deployed fiber feeder in the customer's vicinity.").

[61] *Order* ¶ 119 n.363.

Even assuming that a perfunctory footnote on such a key issue could ever satisfy the strictures of the APA, the Commission's reason for dismissing the CostQuest study only underscores another fatal defect with the CMT. The Commission claims (incorrectly) that the study is not persuasive because it assumes revenues from a single customer, whereas there could be multiple customers to aggregate sufficient demand to justify building out.[62] CostQuest's study analyzed the revenue that a provider must generate at each location in order to recover its costs of building a fiber network necessary to provide BDS, and specifically considered the scenario in which "multiple lower capacity circuits are sold at each location."[63] In any event, the CMT makes no effort to determine the likelihood that this kind of demand would actually be present before concluding that a nearby "competitor" would build out—despite having identified the present business demand as a critically important factor that any test should consider, and seeking comment on an "appropriate business density metric for the competitive market test" in the *FNPRM*.[64] Indeed, if the Commission's reasoning in the *Order* were correct, and only distance mattered when assessing incentives and ability to build out, then high-speed broadband would be as prevalent in less-densely-populated rural areas in America as in its cities. But of course, where the expected demand is greater, so is the expected revenue, and thus there is a greater incentive to build out and a lower per-building cost for doing so.[65] Without measuring

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[62] *Id.*

[63] CostQuest White Paper at 8.

[64] *FNPRM* ¶ 293. *See also id.* ¶ 210 ("The Commission stated that competitive entry is considerably less likely to occur in areas of low demand, regardless of whether other areas within the MSA contain sufficient demand to warrant competitive entry.") (citing *Suspension Order* ¶ 36).

[65] *See FNPRM* ¶ 16 (modeling the decline in per-building buildout costs as potential customer demand, as measured by business density, increases); CostQuest White Paper ¶ 14 ("[A]s

demand, the Commission is left with a test that treats rural areas with few businesses in exactly the same manner as the most concentrated urban business district: a conclusion that itself is unsupportable.[66]

In any event, as explained above,[67] the Commission simply glossed over the substantial evidence in the record submitted by the cable operators themselves explaining the unsuitability of their facilities for providing BDS.[68] The Commission further failed to analyze rationally the entry barriers that would apply to cable providers that seek to overbuild their HFC facilities with

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business density increases, then at a given level of market share (i.e., held constant), the average cost of a served building falls, and thus the revenue hurdle level also falls.").

[66] Even in a rulemaking context, it would be easy for the Commission to build an approximation of demand into its test, either by distinguishing between places with very different business density or by using a proxy for demand, like the number of businesses or employees in a place. *See* Ofcom *Business Communications Market Review* ¶ 5.51 (2013), http://stakeholders.ofcom.org.uk/binaries/consultations/business-connectivity/statement/Section5.pdf. Indeed, the Commission relied on business density analysis in concluding, in the 2012 *Suspension Order*, that its competitive showing triggers—also based on a proxy for sunk investment—were irredeemably flawed. *See Suspension Order* ¶ 51 ("Based on an analysis of the individual ZIP code areas, the probability that the carriers' location decisions in these metropolitan areas were not tied to business establishment density is exceedingly small."). But the *Order* fails to take any steps to approximate demand; nor does it take into account the findings in the 2012 *Suspension Order*.

[67] *See supra* n.40 & accompanying text.

[68] *See, e.g.*, Comcast June 28, 2016 Comments at 20 ("Comcast's Ethernet services provided over its HFC network are not competitive substitutes for the vast majority of BDS customers; even where HFC facilities are present, demand for HFC-based services has been limited."); Letter from Michael H. Pryor, Counsel to Cox, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 05-25, 16-143 (filed Mar. 24, 2017) (confirming that Ethernet over HFC services "are not BDS"); Letter from Samuel L. Feder, Counsel to Charter, to Marlene H. Dortch, Secretary, FCC, at 4 n.18, WC Docket Nos. 16-143 et al. (filed Oct. 3, 2016) (noting "the significant record evidence that Ethernet over coax is not a comparable service" to fiber-based BDS); NCTA June 28, 2016 Comments at 28 (explaining that the performance commitments of Ethernet provided over HFC "often are well below the performance commitments offered with TDM or fiber-based Ethernet services.").

the fiber necessary to offer BDS.[69] In short, when faced with the commercial realities of the BDS marketplace, the Commission's CMT does not—and cannot—explain why a nearby "competitor" would typically have the incentive to build out and thereby provide a competitive constraint on the ILEC.

2. The *Order*'s Fallback Conclusion that Duopoly Markets are Competitive Ignores Well-Established Precedent and Results in a CMT that Conspicuously Fails to Eradicate the Existence of Market Power Sufficient to Maintain Supra-competitive Prices.

The courts and antitrust agencies have long recognized the competitive harms that may arise from unregulated duopolies, including supra-competitive prices and decreased consumer welfare.[70] Indeed, under the Commission's analysis, the antitrust agencies should never

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[69] *See Order* ¶ 31 (asserting that "the underlying facilities used to provision best-efforts services, even over legacy media such as HFC, can be and are being repurposed to provide business data services") (citing Letter from Matthew A. Brill, Counsel to Comcast, to Marlene H. Dortch, Secretary, FCC, at 2, WC Docket Nos. 16-143 et al. (filed Mar. 13, 2017) ("Comcast Mar. 13, 2017 Ex Parte")). *But see* Comcast Mar. 13, 2017 Ex Parte at 2 (noting that extending a fiber lateral to the customer's location is a "capital-intensive construction project[]" that would be subject to an "evaluation of incremental investment opportunities").

[70] *See, e.g.*, *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 n.23 (D.C. Cir. 2001) ("In a duopoly, a market with only two competitors, supra-competitive pricing at monopolistic levels is a danger."); *id*. at 715 ("[W]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels."); *FTC v. CCC Holdings*, 605 F.Supp.2d 26, 67 (D.D.C. 2009) (noting that tacit coordination is a concern"[w]ith only two dominant firms left in the market"); *United States v. H&R Block, Inc.*, 833 F.Supp.2d 36, 44 (D.D.C. 2011) (enjoining an acquisition which would result "in an effective duopoly"); *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 10760, 10789 ¶ 64 (2003); 2002 Hearing Designation Order ¶¶ 170–74; *Application of Air Virginia, Inc. and Clear Channel Radio Licenses, Inc. for Consent to the Assignment of the License of WUMX (FM), Charlottesville, VA*, Hearing Designation Order, 17 FCC Rcd. 5423, 5432 ¶ 27 (2002) ("In general, duopolies are conducive to coordinated behavior that facilitates market division and inefficient price discrimination."); SBC AT&T Memorandum Opinion and Order ¶¶ 65-78; *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, 20008–09 ¶ 37 (1997); *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile*

challenge a three-to-two merger in a high sunk cost market—the Commission clearly suggests that its new "nearby competitor" standard be applicable outside of the realm of BDS, [71]in which case, the Commission itself was wrong in 2014 to conclude unanimously that duopolistic bargaining by big broadcast stations for retransmission consent fees should be outlawed—a result speedily codified by Congress.[72]

After all, the DOJ and the FTC have specifically challenged mergers that result in only two competitors in markets with high sunk costs on the grounds that the transactions would substantially lessen competition and diminish consumer welfare.[73] The Commission's attempt to establish a new safe harbor for duopoly, which it suggests could be applied outside of the BDS context, perhaps when the next merger or rulemaking opportunity appears, is unconvincing.[74]

Radio Service Spectrum Cap, Amendment of the Commission's Cellular/PCS Cross-Ownership Rule, Report and Order, 11 FCC Rcd. 7824, 7872–73 ¶ 100 (1996).

[71] *See, e.g., Order* ¶ 120 n.369 ("[A] recent study of the U.S. residential broadband market finds that entry of a fourth competitor in a zip code has almost no effect on price.") (citation omitted).

[72] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351 (2014) (limiting joint bargaining by the top four stations, including if the four stations create two broadcast sellers of programming to local cable operators).

[73] *See, e.g.*, Complaint at 7 & 32, *United States v. Halliburton Co.*, No. 1:16-cv-00233 (D. Del. Apr. 6, 2016) (challenging acquisition where "customers would effectively face a duopoly after the transaction" where sunk costs included "substantial resources dedicated to product development"); Complaint at 2 & 14, *United States v. AB Electrolux*, No. 1:15-cv-01039 (D.D.C. July 1, 2015) (challenging "duopoly" where sunk costs included the "time and cost of developing a brand recognized for major cooking appliances" and "building effective manufacturing capabilities"); Plaintiff's Memorandum of Law at 1 & 4, *F.T.C. v. Ardagh Group, S.A.*, No. 1:13-cv-01021 (D.D.C. Aug. 28, 2013) (asserting that the "merger to duopoly" was "presumptively unlawful" where sunk costs included factories that "cost hundreds of millions of dollars" to construct); Complaint at 6-7, *United States v. Signature Flight Support Corp.*, No. 1:19-cv-00248 (D.D.C. Feb. 5, 1997) (challenging acquisition resulting in a "duopoly" where "a new entrant would not achieve a large enough share of market revenues to be able to cover the fixed (including sunk) costs of entry").

[74] *See Order* ¶ 120 n.369.

a. The Order Ignores Well-Established Commission Precedent.

The *Order*'s conclusion that the mere presence of a "nearby competitor" will lead to competitive outcomes is plainly inconsistent with well-established Commission precedent.[75] Most telling, the Commission disregards *Qwest Phoenix,* where it raised significant concerns about the competitive nature of a duopoly and established that two competitors are insufficient to constrain ILEC pricing.[76]

Incredibly, the Commission does not even acknowledge its significant departure from the *Qwest Phoenix Order*. Perhaps sensing that it would have no reasonable basis to do so, the Commission spuriously claims that the BDS market now meets "certain conditions" identified in the *Qwest Phoenix Order* under which "duopoly will yield a competitive outcome."[77] This attempt to distinguish the *Qwest Phoenix Order* fails, and exposes yet another example of the unreasoned decision making that is endemic to the Commission's *Order*. Specifically, the Commission claims that the high sunk cost nature of the BDS market gives providers the incentive to extend their network facilities to new locations with demand.[78] But the *Qwest Phoenix Order* did not mention the sunk cost nature of the BDS market. Instead, the *Qwest Phoenix Order* merely acknowledged that under the Bertrand Model of duopoly behavior,

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[75] *See supra* n.71.

[76] *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(C) in the Phoenix, Arizona Metropolitan Statistical Area,* Memorandum Opinion and Order, 25 FCC Rcd. 8622, 8637 ¶ 30 (2010) ("*Qwest Phoenix Order*").

[77] *Order* ¶ 121 (citing *Qwest Phoenix Order*).

[78] *Id.*

duopoly *can* yield a competitive outcome assuming homogeneous products and no capacity constraints.[79]

Here, the *Order* conspicuously omits any reference to the Bertrand Model and fails to identify—because it cannot—any structural factors of the BDS market that would make such a model applicable. The Commission also neglects the substantial record evidence that BDS is *exactly* the type of market in which a duopoly would fail to produce adequate competition.[80] As a result, the *Order* fails to make a serious effort to explain the Commission's departure from *Qwest Phoenix* with the substance and detail required by law.

The Commission also claims that the *Qwest Phoenix Order* is "inapposite" because "providers of fixed wireless last-mile services, including providers of emerging 5G last-mile transmission technology," "promise[]" to bring "widespread" BDS competition at some unspecified point in the future.[81] But this is futuristic hand-waving; indeed, 5G facilities are conspicuously absent from the Commission's geographic market definition analysis because conjectures about their deployment are too gauzy and speculative to support the *Order*. Here, too, the Commission does not seriously attempt to distinguish its previous finding in the *Qwest Phoenix Order* that duopolies do not provide effective competition. Instead, the Commission

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[79] *Qwest Phoenix Order* ¶ 30 n.88 (emphasis added) (citations omitted). Of course, as noted above, cable faces real capacity constraints: cable cannot sell EoHFC in any significant quantity, because the capacity used by such services is shared with—and would swamp the necessary industry capacity to provide—core residential TV, Internet, and phone service.

[80] *See, e.g.*, Baker Declaration ¶ 49 (explaining that high marginal costs reduce the "incentive to compete aggressively . . . on price"); Declaration of Stanley M. Besen and Bridget M. Mitchell ¶ 48, appended as Attachment 1 to Comments of Sprint Corporation, WC Docket No. 05-25 (filed Jan. 27, 2016) (revised public version filed Apr. 11, 2016) (explaining that because competitors lack the footprint of incumbent providers, they "may be limited in their ability to absorb customers who wish to shift their special access purchases from an ILEC").

[81] *Order* ¶ 122.

appears to claim that BDS duopolies should be tolerated, notwithstanding competitive concerns, because they will not persist forever if 5G technologies take shape in precisely the pattern the Commission expects. Of course, the Commission's bare assertion that 5G wireless systems—which are likely years away from development and have yet to be proven commercially—may one day bring ubiquitous BDS competition is insufficient to justify decision making of any kind, let alone to explain the significant departure from the *Qwest Phoenix Order* with the level of detail required by the APA.[82]

b. The Commission Fails to Demonstrate a Lack of Market Power in Markets With Two Competitors.

Flying in the face of well-established Commission and antitrust precedent condemning the competitive ills of an unregulated duopoly, the Commission concludes that there is substantial pro-competitive effect when a single wireline competitor is present to discipline rates, because there is a "general expectation" that the presence of a second provider produces the largest competitive benefits.[83] Even if the Commission's geographic market were justifiable on its own terms, which it is not, the mere presence of a nearby "competitor" for DS1 and DS3 end-user channel terminations is inadequate by itself to demonstrate competition or—more precisely—the absence of market power over the provision of BDS. As the D.C. Circuit has explained, "the existence of a substitute does not necessarily preclude market power."[84] That is why, in a similar regulatory context, the D.C. Circuit held that "the mere existence of some

[82] *See Perez*, 135 S. Ct. at 1209; *Fox*, 556 U.S. at 515.

[83] *Order* ¶ 117.

[84] *NetCoalition v. SEC*, 615 F.3d 525, 542 (D.C. Cir. 2010), *superseded by statute*, Dodd-Frank Act, 124 Stat. 1376, *as recognized in NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013) (quoting 2B Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* § 506(a) (3d ed. 2007)).

alternative does not in itself constrain the railroads from charging rates far in excess of the just and reasonable rates that Congress thought the existence of competitive pressures would ensure."[85]

The Commission attempts to duck this obvious conclusion by asserting that "a combination of either one competitive provider with a network within a half mile from a location served by an ILEC or a cable operator's facilities in the same census block as a location with demand"[86] will result in a competitive market with just and reasonable rates. But the Commission's conclusion fundamentally misunderstands the nature of market power and is not supported by economic theory, the market realities of the BDS industry, or empirical evidence.

Economic theory recognizes that markets with more than one significant competitor do not necessarily perform competitively, and that firms will likely exercise market power in markets with few market participants, with greater concentration resulting in higher prices.[87] The Commission's attempt to sidestep this accepted oligopoly theory falls flat. Indeed, the slender reed of authorities cited by the Commission in support of its proposition that a second provider[88] has the largest competitive impact contradicts the Commission's conclusion. These authorities

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[85] *Ariz. Public Serv. Comm'n v. United States*, 744 F.2d 644, 651 (D.C. Cir. 1984).

[86] *Order* ¶ 117.

[87] *See, e.g.*, Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in 2 Handbook of Industrial Organization 988 (R. Schmalensee & R. Willig, eds. 1989) (Stylized Fact 5.1) (empirical survey); Leonard Weiss, *Conclusion*, in Concentration and Price 266–89 (Leonard Weiss, ed. 1989) (empirical survey).

[88] *See Timothy F. Bresnahan & Peter C. Reiss, Entry and Competition in Concentrated Markets*, 99 J. of Pol. Reporter 977, 1006–07 at Figure 4 (1991) (showing that most of the increase in competition comes with the entry of the second and *third* firms) (*Order* ¶ 120 n.369); Allan Collard-Wexler, *Demand Fluctuations in the Ready-Mix Concrete Industry*, 81 Econometrica 1003, 1006 (2013) ("The first *three* competitors have a noticeable effect on prices") (emphasis added) (*Order* ¶ 120 n.370).

either find additional competitive benefits from additional entrants beyond the second provider or, to the extent they rely on high sunk costs as an incentive for buildout, assume that the incremental cost of providing service to each additional customer is low.[89] But, as demonstrated above, a so-called nearby "competitor" faces substantial incremental costs and impediments to serve an additional location, which the Commission wholly fails to take into account.

Thus, the question is not whether the ILEC's prices could be higher, but whether they are high enough to be treated as supra-competitive.[90] As the D.C. Circuit has explained, "in a competitive market, the price of the product is supposed to approach its marginal cost."[91] That is why "[a] basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost."[92] But the Commission did not analyze ILEC costs to determine whether prices are competitive when a "nearby competitor" is present. Absent a cost analysis, the Commission's conclusion that the mere presence of a "nearby competitor" for DS1 and DS3 end-user channel termination will lead to competitive outcomes cannot stand.

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[89] *See* Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 Yale J. on Reg. 55, 85 (2007) ("fixed costs of building and maintaining a network are very high while the marginal costs of serving any customer are very low") (*Orde*r ¶ 120 n.369); Jonathan E. Nuechterlein and Philip J. Weiser, *Digital Crossroads: Telecommunications Law and Policy in the Internet Age*, at 9 (2nd ed. 2013) ("In contrast [to initial fixed sunk costs], once a network is up and running, the *marginal* cost of providing service to each additional customer is often tiny by comparison, particularly for wireline networks.") (emphasis in the original) (*Order* ¶ 120 n.370); Jerry Hausman and J. Gregory Sidak, *Telecommunications Regulation: Current Approaches with the End in Sight*, in Economic Regulation and Its Reform: What Have We Learned? 345, 403 (Nancy L. Rose, ed., 2005) ("given the high fixed cost and relatively low marginal costs of new customers (especially for telephone service)") (*Order* ¶ 120 n.370).

[90] "Supra-competitive prices are those above what a competitive market can sustain." *Order* ¶ 14 n.44.

[91] *NetCoalition*, 615 F.3d at 537 (internal citation omitted).

[92] *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) (footnote omitted).

Nor does the Commission rely on any empirical data in support of its conclusion that a single BDS competitor has a substantial competitive effect on prices.[93] To the contrary, the Commission found that the pricing data were too noisy to draw any firm conclusions regarding ILEC DS1 and DS3 price changes.[94] Simply put, without any empirical data indicating that a second provider produces the largest competitive benefits or any economic theory consistent with the market realities of the BDS industry, the Commission's conclusion has no leg on which to stand.

3. The *Order* Fundamentally Miscomprehends the Nature of Transport Competition.

The *Order* eliminates existing regulation of all TDM-based transport services based on its conclusion that "competition for TDM transport services is sufficiently pervasive at the local level to justify relief from pricing regulation nationwide."[95] This conclusion is fatally flawed.

The Commission's primary support for its finding of nationwide transport competition is that a significant percentage of BDS customer locations are located within a half mile of competitive fiber transport facilities.[96] But the Commission fails to acknowledge that the distance between a customer location and competitive transport facilities is entirely irrelevant to the question of whether that customer has access to competitive transport facilities. This is because transport services, by definition, carry traffic to and from an end office, not to and from an end-user location, as the Commission correctly observes elsewhere in the *Order*.[97] As a

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[93] *Order* ¶ 120.

[94] *Id.* ¶ 74.

[95] *Order* ¶ 91.

[96] *Id.*

[97] *Id.* ¶¶ 77, 79 n.258 (acknowledging that the term "transport . . . refers to interoffice facilities").

result, the distance between a competitive fiber transport facility and an end-user location has no bearing on the cost of providing that end user with an alternative to incumbent transport, because the distance between the end office that serves the end-user location, and the end office where a transport facility might interconnect with a competitor's network, could be and often is dramatically larger.

Although commenters raised this point to the Commission,[98] the Commission failed to consider the difference between the relevant distances required to analyze channel termination as opposed to transport competition. Instead, the Commission explicitly conflates the two, explaining that it relied on the same "foregoing market analysis" of channel terminations to conclude that "reasonable proximity of a single competitor's facilities" also provides evidence of transport competition. The Commission's express neglect of the differing functions that channel termination and transport circuit elements play in TDM-based wireline networks renders its conclusion of nationwide transport competition arbitrary on its face. If the Commission wishes to examine the possibility of deregulating transport services nationwide, it should first devise a reasonable method for analyzing transport competition—and seek comment on the analysis it proposes to conduct, as discussed in further detail below.[99]

4. The Commission's Failure to Apply Its Own Test in a Logical Manner Demonstrates That It Does Not Believe It to Be Reliable.

[98] *See, e.g.*, Letter from Paul Margie, Counsel to Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, at 17, WC Docket Nos. 16-143 et al. (filed Apr. 13, 2017); Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, at 25, WC Docket Nos. 16-143 et al. (filed Mar. 27, 2017).

[99] *See infra* Section I.B.2 (discussing the Commission's failure to provide notice of and seek comment on nationwide transport deregulation and the rationale underlying its decision).

Even accepting the *Order*'s illogical findings and conclusions—which Petitioners do not—the Commission fails to apply its *own conclusions* in a uniform manner even under the terms the Commission *itself proposes*. As a result, the Commission's results-oriented application of the CMT is a one-way ratchet of deregulation, stripping away price caps nearly across the board.

First, given the *Order*'s reliance on packet-based services as substitutes for TDM-based services, including DS1s and DS3s,[100] there is no basis for the Commission to refuse to apply its CMT for DS1 and DS3 end-user channel terminations to packet-based services of the same bandwidths and higher bandwidth (i.e., above DS3) in circumstances where its test would otherwise mandate price regulation.[101] Applying a different competitive standard for services in the *same relevant product market* not only undermines the Commission's conclusions and analysis, it defies logic.

Second, the *Order* does not even apply its own test to all DS1 and DS3 end-user channel termination services; the Commission fails to apply price cap regulation in non-competitive counties that were previously granted Phase II pricing flexibility.[102] There is simply no rational basis for the Commission's refusal to apply price regulation to counties where there is no competitive choice. The Commission's one-sentence dismissal of this possibility, citing

[100] *Order* ¶¶ 21–26.

[101] *Id.* ¶ 86.

[102] *Id.* ¶ 181.

administrative costs to ILECs associated with billing and information technology,[103] does not equate with reasoned decision-making or the requirements under the APA.[104]

Third, the *Order*'s internal inconsistences create obvious loopholes, which further undermine the Commission's analysis and administrative framework. More specifically, the *Order*'s conclusion that transport is competitive presents rate-evasion opportunities for ILECs in locations where DS1 and DS3 end-user channel terminations are not competitive and therefore subject to price regulation. Thus, if the ILEC is the only DS1 or DS3 provider available, and therefore subject to price regulation, it can still charge supra-competitive prices for the finished connection because, as the *Order* notes, ILECs "do not typically offer consumers BDS by charging a customer separately for transport, last-mile access, and channel mileage," offering instead "packaged communications solutions that include a transmission component."[105]

B. The *FNPRM* Failed to Provide Sufficient Notice as Required by the APA.

Disclosing the content and basis for a proposed rule in advance of adoption is a core element of the APA's notice requirement.[106] While an agency may adopt final rules that differ

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[103] *Id.* ¶ 181 n.485.

[104] *See United Techs. Corp. v. U.S. Dep't of Defense*, 601 F.3d 557, 565 (D.C. Cir. 2010) (agency failed to provide reasoned basis for conclusion because "[a] naked conclusion . . . is not enough").

[105] *Order* ¶ 90 n.289 (citation omitted).

[106] *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process.") "Enforcing the APA's notice and comment requirements" accordingly entails that the agency must "reveal . . . the technical basis for a proposed rule in time to allow for meaningful commentary." *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236–37 (D.C. Cir. 2008) (internal citation omitted). The agency need not "assiduously lay out every detail of a proposed rule for comment," but it must "provide sufficient detail *and the rationale for the rule* to permit

"in some particulars" from its proposal under this standard, its final rules must in all cases reflect "a logical outgrowth of the one[s] proposed."[107] In addition, the notice must "provide an accurate picture of the reasoning that has led the agency to the proposed rule," so that "interested parties [are] able to comment meaningfully upon the agency's proposals."[108] If the agency fails to reveal the "basis for a proposed rule in time to allow for meaningful commentary," it "may operate with a one-sided or mistaken picture of the issues . . . ."[109]

That is precisely what happened here. As explained below, the Commission performed an about-face from the 2016 *FNPRM*'s proposal without publicly advancing any rationale or analysis to support the new rules until just weeks before the final order. As a result, both prongs of the CMT fail the "logical outgrowth" test that the courts have developed to enforce the requirements of notice and comment. The same is true with respect to the Commission's new rule deregulating transport services nationwide. Critically, the Commission did not disclose its rationale and analytic basis for the change in direction until it released a draft version of the *Order* a mere two weeks before the Commission's rules prohibited further input from the public. Of course, the draft *Order* did not *propose* or *seek comment* on anything—and did not provide parties enough time to digest and challenge the Commission's analysis before the Commission adopted the *Order*.

1. The Commission's Reversal on the CMT Violated Notice-and-Comment Requirements.

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interested parties" to meaningfully critique its approach. *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (emphasis added) (internal quotations omitted).

[107] *Horsehead Res. Dev. Co.*, 16 F.3d at 1267 (internal quotation marks omitted).

[108] *Conn. Light & Power*, 673 F.3d at 530.

[109] *Id.* at 530–31.

The *FNPRM* identified explicit market failures and proposed a regulatory remedy designed to address those failures. Specifically, it found that "competition is lacking in BDS at or below 50 Mbps in many circumstances."[110] It also found that its 1999 pricing flexibility triggers "failed to reflect the scope of competitive entry" because they applied MSA-wide regulatory relief based on inaccurate proxies of competition, which measured a competitor's sunk investment rather than entry or ability to enter the BDS market.[111] Against this backdrop, the *FNPRM* "propose[d] a test" designed to ensure that regulatory relief was not granted "too broadly to cover areas where competition is not present or unlikely to occur."[112] In short, the *FNPRM* proposed a new CMT designed to achieve *greater* sensitivity to local conditions in its effort to more accurately analyze competition, and to do so consistent with "traditional economic principles."[113]

The *Order* moves sharply in the opposite direction. Instead of requiring greater specificity in determining where and for which products to grant regulatory relief, the *Order* adopts a two-pronged CMT, each of which dismantles the price cap regime for virtually all incumbent channel terminations in the country. In doing so, the *Order* relies extensively on reasoning and analysis that it failed to include in the *FNPRM*, and which commenters had no meaningful opportunity to test or critique.

As discussed above, the CMT's first prong deems an entire county competitive if 50 percent of buildings with businesses with BDS demand are within a half mile of a building

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[110] *FNPRM* ¶ 271.

[111] *Id.* ¶ 287.

[112] *Id.* ¶¶ 271, 290.

[113] *Id.* ¶ 280.

served by a competitive provider. The Commission did not propose this approach in the *FNPRM*. Nor does this approach reflect a logical outgrowth of the test the Commission *did* propose—in fact, the final test departs from the test proposed at every turn.

To begin with, while the *FNPRM* proposed a test that would provide regulatory relief on a granular, targeted basis, the CMT's first prong deregulates almost the entire country.[114] Moreover, as detailed above,[115] this prong departs from the "traditional economic analysis" the *FNPRM* proposed to apply, because it treats providers that are not timely, likely, and sufficient entrants as "competitors," and falsely equates hypothetical BDS duopolies with actual BDS competition.[116]

In addition, the Commission never explained the rationale for its test prior to adoption. While the Commission might have developed a model predicting that a competitor serving a building within a half mile would constrain ILEC pricing, it only explained the basis for its prediction in the draft *Order* itself—and there was hardly sufficient time for commenters to perform a thorough economic analysis in the two weeks between circulation of the draft and sunset in this proceeding. Indeed, while agencies are required to provide notice of "the assumptions and methodology used in preparing [a] model"—and offer a "complete analytic defense" to the extent "the methodology is challenged"[117]—no challenge was even possible in the proceeding here, because no relevant model or analysis was ever provided.

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[114] *Order* ¶ 142.

[115] *See supra* Section I.A.

[116] *Order* ¶ 120 n.368.

[117] *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 204–05 (D.C. Cir. 2007).

The same is true with the CMT's second prong, which deems a county competitive if 75 percent of census blocks in the county have a cable provider providing service according to data reported on the Commission's Form 477. Again, this test was not proposed in the *FNPRM*. And, again, this test is not a logical outgrowth of the *FNPRM*.

First, the CMT's second prong sweeps just as overbroadly as the first prong, in contradiction to the *FNPRM*'s proposal to develop a test more sensitive to local competition.[118] Moreover, the *FNPRM* explicitly stated that "mass marketed 'best efforts' broadband" are not in the same product market as BDS,[119] leaving commenters with no reason to anticipate that the Commission would construct a test that deems a market competitive based exclusively on the presence of facilities used for mass market, best efforts broadband services. Nor did the *FNPRM* explain the Commission's rationale for the second prong—the flawed theory that cable companies are willing and generally able to convert best efforts facilities to fiber.[120] Once again, if the Commission modeled cable operators' ability to fundamentally repurpose their networks, it did not share that analysis in advance of releasing the *Order* as the APA requires.[121] Indeed, the only data on which the Commission apparently did rely in adopting the cable prong of its test—

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[118] *Order* ¶ 142 (confirming that the second prong deregulates nearly 90 percent of BDS locations).

[119] *FNPRM* ¶¶ 190–196.

[120] *See infra* pp. 13, 18-19 and notes 40, 56 (discussing record evidence indicating that cable operators cannot provide Ethernet-equivalent services at scale because of the shared nature of cable capacity and the need to maintain that capacity for core residential video and broadband business).

[121] *Air Transp. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("[M]aterial that is used to support the agency's position" must be "made public *in the proceeding* and exposed to refutation."); *see also Owner-Operator Indep. Drivers Ass'n*, 494 F.3d at 201 (invalidating rule because the agency had failed to disclose "the model and methodology" it used to assess the "regulatory options").

Form 477 data—likewise have not been subject to scrutiny. The *FNPRM* simply never suggested that Form 477 data could or would be used for this purpose.[122]

The Commission's decision to "grandfather" counties deemed non-competitive under either prong of its own CMT[123] further demonstrates the chasm between the *FNPRM* and the *Order*. While the *FNPRM* specifically sought to correct *both* over- and under-regulation that resulted from MSA-wide determinations of regulatory relief,[124] the one-way ratchet adopted by the Commission does no such thing.

Nor does the final CMT reflect a logical outgrowth of the agency proposal.[125] For example, in *Agape Church, Inc. v. Commission*, 738 F.3d 397 (D.C. Cir. 2013), the D.C. Circuit found that the Commission's rule requiring cable operators to provide equipment to analog customers to "downconvert" digital signals was a logical outgrowth of the relevant notice of proposed rulemaking. That notice sought comment on whether to extend the pre-existing rule requiring cable companies to downconvert and supply analog signals. But the notice did not stop there. It explicitly acknowledged that equipment "would be required in the absence of an analog

[122] Far from proposing Form 477 data as a lynchpin of the CMT, the *FNPRM* contains only a single reference to Form 477 data in the context of *future* data collection efforts based on Form 477s *modified* to include information about BDS facilities. *FNPRM* ¶ 524.

[123] *Order* ¶ 181; *see also id.* at Appendix A, § 1.776.

[124] *FNPRM* ¶ 28 (noting that the pricing flexibility "triggers were . . . both over- and under-inclusive as predictors of competition," and proposing a CMT to function as "a permanent reliable replacement approach to measure the presence of competition for special access services" (quoting *Suspension Order* ¶ 6); *see also id.* ¶¶ 274–75 (noting that the triggers resulted in under-regulation and over-regulation).

[125] *See, e.g.*, Letter from Bryan N. Tramont, Counsel to CenturyLink, Inc. and Frontier Communications Corp, to Marlene H. Dortch, Secretary, FCC at 12-14, WC Docket Nos. 16-143 et al. (filed Apr. 6, 2017).

carriage requirement."[126] Against this backdrop, the court correctly ruled that the final rule was a "logical outgrowth" of the notice, because the final rule merely settled on an equipment-based method specifically identified as a possible approach in the notice.[127]

Here, on the other hand, the *Order* does not select from alternatives proposed—it altogether replaces the Commission's previous proposal. Instead of remedying market failures with a CMT that analyzes competition with *greater* sensitivity, the final *Order* largely disclaims such failures exist—and turns to a CMT even less sensitive than the blunt 1999 triggers the *FNPRM* sought to correct. Along the same lines, while some courts have allowed agencies to opt for only "partial adoption of the proposed comprehensive rule,"[128] the present case involves no such thing. Far from pursuing a "partial adoption" that "differs in some respects from [the] proposed regulation" of the *FNPRM*, the Commission chose a complete reversal.[129]

2. The *FNPRM* Did Not Even Suggest that Transport Might be Deregulated Completely, and in Fact Proposed Just the Opposite.

The procedural deficiencies of the Commission's decision to deregulate transport services nationwide are even more appalling. In the *FNPRM*, the Commission did not propose, or even suggest, that transport might be entirely deregulated. Nor is nationwide deregulation a logical outgrowth of the *FNPRM*.

As an initial matter, and as noted above, the *FNPRM* proposed to provide regulatory relief across markets *smaller* than an MSA. The entire country, of course, represents a much

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[126] *Agape Church, Inc.*, 738 F.3d at 412 (quotation omitted).

[127] *Id.*

[128] *Miami-Dade County v. EPA*, 529 F.3d 1049, 1059 (11th Cir. 2008) (quotations omitted).

[129] *Id.* (confirming that "[n]otice is inadequate . . . if the interested parties could not reasonably have anticipated the final rulemaking from the draft rule") (quotation omitted).

larger geographic unit. Moreover, the Commission expressly "propose[d] to abandon" the 1999 pricing flexibility triggers "for channel terminations and other dedicated transport services" *in favor of "a new Competitive Market Test."*[130] Nationwide deregulation, however, reflects a logical inconsistency with the Commission's proposal to apply a CMT, not a logical outgrowth. The purpose of a CMT is "to determine whether a relevant market is competitive or non-competitive."[131] But if the "relevant market" were the entire country, there would be no need to apply a CMT at all.

Nor did parties have an opportunity to comment on the competitive analysis and rationale supporting the Commission's unanticipated deregulatory step for transport. First, the Commission found transport services generally competitive based primarily on the number of buildings located within a half mile of competitive fiber transport facilities.[132] But it did not propose to analyze transport competition on this basis in the *FNPRM*. Had it done so, commenters would have had a meaningful opportunity to critique that analysis and suggest alternatives that do not fundamentally miscomprehend the role of transport connections.[133] Second, the Commission's rationale for deregulating transport nationwide, notwithstanding its acknowledgment that transport services were non-competitive in some parts of the country, was its belief that "the alternative would . . . impose significant regulatory burdens on all participants

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[130] *FNPRM* ¶ 278 (emphasis added) ("[W]e propose to abandon the collocation-based competition showings for channel terminations and other dedicated transport services for determining regulatory relief for ILECs. Instead, we propose to apply a new Competitive Market Test."). *See also id.* ¶ 5 (calling the Competitive Market Test the "core" of the Commission's proposal).

[131] *Id.* ¶¶ 270, 292.

[132] *Order* ¶ 91.

[133] *See* Section I.A.3, *supra.*

in the market with an additional layer of regulatory complexity that would undermine predictability and ultimately hinder investment, including in entry, and growth."[134] This reflects a fundamental departure from the rationale of the *FNPRM*, which viewed it as the "government's role" to identify non-competitive areas with greater precision, and ensure that those markets remain subject to pricing regulation.[135]

II. THE BALANCE OF THE EQUITIES FAVORS A STAY.

The *Order*'s seismic changes to the Commission's longstanding regulatory regime will fundamentally disrupt the $45 billion BDS industry. If the *Order* takes effect, petitioners will *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY CONFIDENTIAL INFORMATION***** They also will have to negotiate, under conditions newly favorable to the ILEC, long-term agreements that will cement ILEC price increases for years to come, and influence the marketplace even if the Commission's rules are later struck down. These harms are substantial, imminent, and certain to occur, and petitioners would have no means to recover them if the Court ultimately vacates the *Order*. Maintaining the status quo pending review, on the other hand, would not harm anyone, and would serve the public interest.

A. Petitioners Will Suffer Irreparable Harm if the *Order* Takes Effect.

The *Order* threatens to dismantle incumbent pricing regulation and tariffing requirements. Unconstrained by price caps, ILECs will increase rates substantially as they have in the past in response to deregulation, and as they have threatened to do in response to this

[134] *FNPRM* ¶ 93.

[135] *Id.* ¶ 5 ("But where competition does not exist, government's role is to ensure that non-competitive market conditions do not disadvantage business customers and their ability to compete and innovate in downstream markets.").

Order. These price increases will be cemented into multiyear contracts negotiated in the shadow of the Commission's new rules. The result will be *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY CONFIDENTIAL INFORMATION***** In addition, the petitioners and many other buyers of BDS will have to individually negotiate agreements for ILEC BDS that are detariffed under the *Order*. None of these harms can be remedied if a reviewing court ultimately invalidates the *Order*.

BT, Windstream, and similarly situated members of INCOMPAS sell retail communications solutions in competition with ILECs or their wholly-owned affiliates. These retail services *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY CONFIDENTIAL INFORMATION***** that are the subject of the *Order*'s deregulatory action.[136] The costs of these crucial inputs—for which the ILEC is often the only supplier—*****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY CONFIDENTIAL INFORMATION*****[137] The *Order* will also result in *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY CONFIDENTIAL**

[136] Declaration of Jennifer Artley ¶ 5, appended as Attachment A hereto ("BT Decl."); Declaration of Joseph Harding ¶ 9, appended as Attachment B hereto ("WIN Decl.").

[137] BT Decl. ¶ 18; WIN Decl. ¶ 8.

INFORMATION***[138] Although the United States is the largest and most target-rich market in the global network services marketplace, ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted] ***END HIGHLY CONFIDENTIAL INFORMATION*** and BT must commence taking steps to ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted] ***END HIGHLY CONFIDENTIAL INFORMATION*** that, absent the imminent change in rate regulation, BT ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted] ***END HIGHLY CONFIDENTIAL INFORMATION***[139] ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted] ***END HIGHLY CONFIDENTIAL INFORMATION***[140] ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted] ***END HIGHLY CONFIDENTIAL INFORMATION***during the pendency of the review of the *Order* are unrecoverable.

Moreover, the *Order*'s removal of pricing regulation for access to more than 90 percent of U.S. buildings with BDS demand would permit ILECs to tighten their price squeeze on the petitioners ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted]

[138] BT Decl. ¶ 27.

[139] *Id.* ¶ 28.

[140] *Id.*

[redacted] *****END HIGHLY CONFIDENTIAL INFORMATION*****[141]

On the margin side of the squeeze, increased DS1 and DS3 input prices will drive up petitioners' costs substantially. Because petitioners purchase their DS1 and DS3 inputs from ILECs pursuant to term and volume agreements, these costs will continue to govern well past the pendency of this appeal.[142] Moreover, these costs cannot *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY CONFIDENTIAL INFORMATION*****[143] *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY CONFIDENTIAL INFORMATION*****[144] Thus, petitioners must absorb the full brunt of ILEC price increases for affected customer locations, resulting in millions of dollars of unrecoverable added costs for services that petitioners are contractually required to provide.[145]

For example, *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY**

[141] *Id.* ¶¶ 16, 18; WIN Decl. ¶ 25.

[142] BT Decl. ¶ 19; WIN Decl. ¶¶ 6, 13.

[143] Of course, to the limited extent that costs can be passed through to customers, the result would be harm to the public more generally, including to petitioners Ad Hoc and INCOMPAS, which represent BDS end users.

[144] BT Decl. ¶ 19; WIN Decl. ¶ 11.

[145] WIN Decl. ¶ 27.

CONFIDENTIAL INFORMATION***[146] BT, ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted] ***END HIGHLY CONFIDENTIAL INFORMATION*****[147] Petitioners will be ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted] ***END HIGHLY CONFIDENTIAL INFORMATION*****—even if they ultimately prevail on appeal.[148]

Of course, the price squeeze works because petitioners would have no choice except to pass along higher input costs in their own retail rates for potential new customers, and for existing customers seeking to renew their multiyear deals. Needless to say, this would place them at a severe competitive disadvantage to the ILEC.[149] The ILECs do not face a similar prospect of increases to their own BDS input costs because they own the underlying facilities, which are fully depreciated or close to it[150] and because they are selling themselves the service—as one part of the business makes an intra-corporate transfer to another. Thus, ILECs will undercut their competitors' retail prices—perhaps long enough to drive them from the market completely. This outcome is even more certain to occur ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted]

[146] *Id.* ¶ 27.

[147] BT Decl. ¶¶ 18–20.

[148] WIN Decl. ¶ 27.

[149] BT Decl. ¶¶ 27–28; WIN Decl. ¶ 25.

[150] WIN Decl. ¶ 25.

[redacted]*****END HIGHLY CONFIDENTIAL INFORMATION*****[151]

For example, over the next 12 months alone, "Windstream expects to *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY CONFIDENTIAL INFORMATION*****"[152] Because these lost customers will enter into multiyear contracts with another provider—most likely the ILEC—this loss to the petitioners will also long outlive the pendency of this appeal.[153] No remedy exists for such forgone opportunities and lost competition caused by regulatory changes, even those as arbitrary, capricious, and contrary to law as the rules adopted in the *Order*.

Past and recent experience demonstrates these harms are certain, imminent, and have already begun to occur. In the past, the industry suffered "ILEC price increases routinely if not always following the FCC's grant of pricing flexibility in a given" MSA.[154] Recent experience demonstrates ILECs are certain to raise rates again here. First, the Commission's own data demonstrate that ILECs currently charge between 99.7 percent and 99.9 percent of their current price cap indices, proving that the price caps the *Order* would dismantle are working to keep ILEC rates at bay.[155] Second, in the current market, Windstream faces more extensive price

[151] BT Decl. ¶ 19.

[152] WIN Decl. ¶ 27.

[153] *Id.*

[154] *Id.* ¶¶ 17–18.

[155] *FNPRM* ¶¶ 240–41 & Tbl. 6.

squeezes on unregulated BDS as compared to price-capped DS1 and DS3 services[156]—a pattern corroborated by record evidence of similar current ILEC pricing behavior.[157] Third, the ILECs have all but informed the Commission that a rate increase is imminent, by complaining repeatedly throughout this proceeding that current price caps are too low,[158] and by raising rates on private line services that are similar to BDS just days before the Commission adopted the *Order*.[159] Fourth, the broader marketplace has already begun to price in ILEC rate increases in response to the *Order*.[160] Because ILECs sell by far the most DS1s and DS3s, and because these services typically are sold through contracts with multiyear terms, the expectation of price increases in the short term—during the pendency of the appeal—drives immediate rate increases throughout the market. *****BEGIN HIGHLY CONFIDENTIAL INFORMATION***** [redacted] *****END HIGHLY**

[156] WIN Decl. ¶ 17.

[157] Using rates made public by the ILEC, and internal data on actual rates paid, participants in the Commission's rulemaking demonstrated that (1) ILECs charge as much as 109 percent more for DS1 and DS3 services in areas where they are not subject to price caps as compared to price cap areas, and (2) ILECs consistently charge more than CLECs for BDS services of similar types. *See* Letter from Paul Margie, Counsel to Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, at 17, WC Docket Nos. 16-143 et al. (filed Nov. 9, 2016); Letter from Charles W. McKee, Vice President, Government Affairs, Sprint Corporation, to Marlene H. Dortch, Secretary, FCC, at 5, WC Docket Nos. 16-143 et al. (filed Oct. 17, 2016).

[158] *See* Letter from Russell P. Hanser, Counsel to CenturyLink, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 16-143 et al. (filed Oct. 28, 2016). Of course, if below-cost pricing were truly a concern, the Commission's existing price cap rules provide ILECs the option to apply for rate-of-return regulation, which guarantees rates above the ILEC's costs. 47 C.F.R. § 61.41(e).

[159] WIN ¶ 19; *see also Price Change Notification*, AT&T US Domestic Access Channels, AT&T, http://serviceguidenew.att.com/sg_landingpage?tgtPg=sg_nonArchivedFilePreviewer&testid=0681A0000030EbnQAE.

[160] BT Decl. ¶ 15.

CONFIDENTIAL INFORMATION***[161] Windstream likewise projects ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*** [redacted] ***END HIGHLY CONFIDENTIAL INFORMATION*****[162]

The Commission itself has recognized that this kind of price squeeze is a serious impediment to competition. It has explained that ILECs have an incentive to "initiate a price squeeze to gain additional market share."[163] It has recognized circumstances in which "a price squeeze is evident, *such as when a monopolist's wholesale rates exceed retail rates*."[164]

In addition to facing rate increases on deregulated DS1s and DS3s, petitioners will suffer an additional form of irreparable harm. This is because, under the *Order*, they can no longer expect that ILECs will continue to provide them with these TDM-based inputs at all. Faced with the risk that ILECs will summarily withdraw TDM access, BT will ***BEGIN HIGHLY CONFIDENTIAL INFORMATION***" [redacted] ***END HIGHLY

[161] *Id.*

[162] WIN Decl. ¶¶ 16, 26.

[163] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, Second Report and Order, 12 FCC Rcd. 15756, 15849 ¶ 161 (1997).

[164] *INFONXX, Inc. v. N.Y. Telephone Co.*, Memorandum Opinion and Order, 13 FCC Rcd. 3589, 3598 ¶ 18 (1997) (emphasis added) (citing *City of Mishawaka, Ind. v. American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980)); *see also Verizon Tel. Co. Tariff FCC Nos. 1 & 11, Transmittal No. 232*, Order Designating Issues for Investigation, 17 FCC Rcd. 23598, 23599 ¶ 3 (2002) (Commission ordered Verizon (an ILEC) to explain its tariffed rates for DSL access services it provides to certain resellers (CLECs), after they raised concerns that Verizon's wholesale rates were unreasonably high).

CONFIDENTIAL INFORMATION***[165] ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted]**[redacted]*****END HIGHLY CONFIDENTIAL INFORMATION*****[166] ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted]**[redacted]*****END HIGHLY CONFIDENTIAL INFORMATION*****[167] The process is also time-consuming, ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted]**[redacted]*****END HIGHLY CONFIDENTIAL INFORMATION***** to migrate each access circuit.[168] Switching to EoHFC is not possible in most locations, would not meet customers' performance demands even if it were available, and ***BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted]**[redacted]*****END HIGHLY CONFIDENTIAL INFORMATION*****[169]

Finally, the *Order* permits ILECs to detariff on day one, raising the specter of industry-wide, individual negotiations over services previously sold by tariff. Not only will these negotiations cement higher rates for the reasons discussed above, they also will produce enormous and wasteful transaction costs that are unrecoverable, and that would have been

[165] BT Decl. ¶¶ 22–24.

[166] *Id.* ¶ 23.

[167] *Id.*

[168] *Id.*

[169] *Id.* ¶¶ 24–26.

completely unnecessary in the event of a decision vacating the *Order*. These harms, too, are certain and imminent. In fact, AT&T has already met with the Commission to clarify that it can begin to detariff on August 1, 2017.[170]

Precedent makes clear that stays are appropriate in cases involving rules that fundamentally alter the telecommunications regulatory landscape, and that would have immense and long-lasting pricing impacts that influence the marketplace well after an appeal concludes. Indeed, the D.C. Circuit recently stayed the Commission rules that impact the rates charged by telecommunications providers, recognizing the irreparable nature of the losses sustained as a result of regulatory changes that affect telecommunications rates.[171] The D.C. Circuit also stayed the effective date of a Commission order that would result in industry-wide detariffing, based on arguments that the negotiations that would become necessary in the absence of tariffs would foist enormous and unrecoverable costs on the industry.[172] Like the orders in those D.C. Circuit cases, the *Order* at issue in this appeal would affect rates industry-wide, force onerous and potentially unnecessary individual negotiations, and alter the competitive landscape for BDS and BDS-enabled services for years to come.

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[170] Letter from Caroline Van Wie, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, at 1, WC Docket Nos. 16-143 et al. (filed June 15, 2017) ("Bureau staff informed us that the rules governing permissive detariffing adopted in the Order do not require review by the Office of Management and Budget ('OMB') and that price cap ILECs may therefore begin detariffing on a permissive basis on August 1, 2017, the effective date of the Order.").

[171] *See* Per Curiam Order, *Global Tel Link v. FCC*, No. 15-1461 (D.C. Cir. Mar. 23, 2016).

[172] *See* Per Curiam Order, *MCI WorldCom, Inc. v. FCC*, No. 96-1459 (D.C. Cir. Feb. 13, 1997).

Courts also have recognized that decisions which threaten a party's ability to cover the costs of doing business warrant a stay, especially when such losses cannot be recovered later.[173] As explained above,*****BEGIN HIGHLY CONFIDENTIAL INFORMATION*****[redacted]*****END HIGHLY CONFIDENTIAL INFORMATION*****[174]

B. A Stay Will Not Harm Other Parties and is in the Public Interest.

Granting a stay here will maintain the status quo, allowing all parties—including the ILECs—to avoid expending significant and potentially unnecessary costs to conform to a fundamentally different regulatory regime. No harm would befall the ILECs. The status quo currently allows ILECs to exercise extensive market power over DS1s and DS3s, and there is no evidence that existing price caps are too low—indeed, the Commission saw no need to increase them in the *Order*. The Commission's order supports this conclusion, finding that it "expect[s] that competition will continue to keep prices in check" and disagreeing with some parties that "prices at the cap demonstrate that incumbent LECs generally would have set materially higher prices wherever their process were capped and that prices for business data services will increase significantly as a result of [the Commission's] actions in th[e] Order."[175] Any notion that the

[173] *See Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010); *Brendsel v. Office of Fed. Hous. Enterprise Oversight*, 339 F. Supp. 2d 52, 66–67 (D.D.C. 2004).

[174] BT Decl. ¶ 18.

[175] *Order* ¶ 76.

new framework presents the only path for an ILEC to charge rates above its costs is simply incorrect as a matter of law.[176]

By contrast, the public interest would benefit from a stay. BDS services pervade the American economy.[177] They are necessary for the day-to-day operation of retailers, financial institutions, hospitals, wireless carriers, schools and libraries, and government agencies.[178] Unconstrained, ILEC price hikes for BDS will flow downstream to these BDS purchasers and, ultimately, consumers of their services.[179] Less competition in the retail market leads to increased prices, less choice, decreased innovation and customization, and lower quality services for commercial subscribers.[180]

Indeed, BDS functions as an important "stepping stone" for subscribers and competitive carriers alike in reducing the risk of deployment when the demand for a new service or the viability of a new market cannot be quantified.[181] Markets with lower ILEC BDS pricing are more attractive to competitive entrants because these carriers may be able to reach subscribers at a lower cost and, thereby, quickly capture enough market share to support their own network

[176] 47 C.F.R. § 61.41(e) (allowing ILECs to switch from price cap to rate-of-return regulation).

[177] Declaration of David J. Malfara Sr. ¶ 5, appended as Attachment C hereto ("INCOMPAS Decl.").

[178] *See* Letter from Mark Cooper, Director of Research, Consumer Federation of America, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al. (filed Mar. 30, 2017) ("CFA and PK Letter").

[179] INCOMPAS Decl. ¶¶ 6–7.

[180] *Id.*

[181] *Id.* ¶ 4.

build-out.[182] The higher the BDS pricing in market, the proportionately lower the likelihood of buildout, and the more likely subscribers will suffer the harms of a lack of competition.[183]

The *Order* also reduces carrier choice for multi-location commercial subscribers, who require communications services to be provided at dozens, hundreds or even thousands of physical locations where the corporation has a presence.[184] As competitive providers leave the market, multi-location subscribers may not have a single competitive alternative to the ILEC because of the need to support offices in a wide geographic territory, including satellite offices where only an ILEC facility may exist.[185]

Absent a stay, business and community institutions will lack alternatives and face supra-competitive prices for DS1 and DS3 services.[186] This is particularly problematic for small and emerging businesses—primary purchasers of DS1 and DS3 services.[187] Affordable ILEC BDS allows competitors to provide these subscribers with what is often their first access to BDS at entry-level prices where, absent the competitive offering, they would have no access to such

[182] *Id.* ¶¶ 8–9.

[183] *Id.* ¶ 10.

[184] *Id.* ¶ 13.

[185] *Id.* ¶¶ 14, 16.

[186] *Id.*; *see also* Declaration of Susan M. Gately ¶¶ 7, 10–11, appended as Attachment D hereto (explaining that businesses continue to rely on lower bandwidth DS1 and DS3 services, and that BDS customers' experience shows that prices will increase absent a stay).

[187] *See* Letter from Major L. Clark III, Acting Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al. (filed Apr. 13, 2017).

services at all.[188] In the end, the *Order*'s harms will be borne by the public in the form of higher consumer prices.[189]

Respectfully Submitted,

/s/Christopher J. Wright

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June 23, 2017

[188] INCOMPAS Decl. ¶ 18.

[189] *See* CFA and PK Letter.

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF JENNIFER ARTLEY

I, Jennifer Artley, hereby declare:

1. My name is Jennifer Artley. I am over the age of 21, and I am competent to make this declaration. I make this declaration in support of the motion of BT Americas, Inc. for stay pending judicial review of the Federal Communications Commission's Business Data Services Report and Order ("*BDS R&O*"). The matters cited in this declaration are based on my personal knowledge, information, and belief, and if called to testify, I could and would testify to the same effect.

2. I am currently the President of BT Global Services' business across the Americas region. BT Global Services is the international business division of British Telecommunications plc ("BT"), which generates about *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of global revenue by providing information, communications and technology services to 5,500 multinational

companies in 180 countries. I assumed my current position in June 2017. Prior to this, I was the Chief Operating Officer for BT Global Services' operations the Americas region. I have been with BT Global Services since 2014, and I have over 15 years of experience in providing information, communications and technology services to multinational companies and government entities. BT Americas, Inc. is the lead operating entity of BT Global Services in the United States.

3. I am not a lawyer, but I understand that, among other things, the *BDS R&O* concerns the regulatory treatment of business data services ("BDS"), which provide dedicated point-to-point connectivity at certain guaranteed speeds and service levels to businesses, non-profits, schools, universities, hospitals, federal, state and local governments, and cell towers, allowing entities to securely and reliably connect their offices, factories, and other facilities to private data networks, cloud-based applications and services, the Internet, and the public switched telephone network. The difference between best efforts broadband Internet access and BDS is that BDS is highly reliable, always available, and secure, and it is sold with service level commitments.

4. The *BDS R&O* broadly deregulates the marketplace for BDS, and determines that certain business data services are not subject to common carrier regulation under the Communications Act of 1934, as amended. Specifically, I understand the *BDS R&O* removes price-cap regulation for so-called low bandwidth, time-division multiplexing ("TDM") inputs (or circuits), which represent roughly *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of our access inputs purchased in the United States. In addition, I understand the *BDS R&O* eliminates the previous requirement that incumbent

telecommunications companies provide reasonably comparable telecommunications inputs when they retire or eliminate the existing TDM access circuits on which BT relies.

5. The *BDS R&O* irreparably harms BT. As discussed in greater detail below, it has introduced a ticking time-bomb in BT's operations in the United States with respect to the *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of these low bandwidth TDM access circuits BT uses to connect many of its customers' facilities in the United States to their voice and data networks. After the *BDS R&O* becomes effective, AT&T and Verizon, BT's main suppliers of these low bandwidth TDM access circuits—who also are BT's main competitors in the downstream global enterprise services market—will no longer be constrained to offer BT a TDM alternative that is comparable in price and bandwidth offerings, or has comparable service delivery times, service quality and operational support systems, or to set the wholesale rates for the alternative at less than or equal to retail rates. BT cannot *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

6. BT will be placed in a position of having to respond by, among other things, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** It will have to*****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** causing *****BEGIN HIGHLY CONFIDENTIAL***** [redacted]

*****END HIGHLY CONFIDENTIAL***** for customers that have voice and other equipment or applications that are *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** The *BDS R&O* also *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** Finally, BT*****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** These harms are great, and they already have begun to occur.

7. BT is one of the top four global providers of communications services to multi-location, global corporations. The other three providers are AT&T, Verizon, and Orange Business Services, which is a business unit of France Telecom.

8. The United States is a critical market for BT. The United States accounts for over one-third of the global enterprise managed services market. It is the largest market for BDS in the world. The United States is one of BT's largest markets outside the United Kingdom. Approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in 2016-2017 was generated in the United States.

9. BT has provided services in the United States for over 30 years, serving customers in industries in nearly every sector of the economy, including financial services, energy, automotive, healthcare, manufacturing, media, government, consumer goods, technology, travel, and transportation. BT's customers include such household names as US- and EU-headquartered companies Bristol-Myers Squibb, Proctor & Gamble, Unilever, Credit Suisse, Schlumberger, and the New York Stock Exchange.

10. These multi-location global entities choose BT because it offers seamless, reliable, always on, made-to-order communication services that have the same look, feel, functionality, and interoperability no matter where in the world an employee of the entity resides—from Baltimore, to Bristol, to Bangalore, to Beijing. They look to BT to provide an efficient one-stop shop for all of their global communications needs.

11. In today's global economy, corporations extensively rely on BT and other providers of global BDS. For example, we recently offered:

(i) A healthcare provider the ability to provide long-distance telemedicine, collaboration, and mobility for employees and patients;

(ii) An automotive manufacturer the ability to connect its global design team, engineers, and global supply chain, resulting in more efficient manufacturing and releases of new products such as Internet-connected cars;

(iii) A pharmaceutical manufacturer the ability to connect its global community of scientists and healthcare practitioners to improve their research and development of new products and facilitate compliance relating to the development of such products with safety regulators; and

(iv) A leading bank the ability to extend its global reach for its customers to their accounts through mobile platforms.

12. BT's customers demand service level commitments because, among other things, many of the applications that rely on BT's services are critical to our customers' businesses. Financial service companies can lose millions of dollars due to nanosecond delays in trading. Healthcare providers need access to medical records in real-time, and all the time, to serve their patients. Oil companies need real-time data from sensors monitoring critical infrastructure such as pipelines to provide alerts to spills and other safety hazards. Such companies may have a small percentage of communications functions (e.g., browsing the World Wide Web, email, search) for which they would be willing to experiment with a business data service that does not provide such service level commitments, but for the bulk of their needs, they demand that we provide 99.99% or 99.999% service availability.

13. Because global corporations require BT and other providers of BDS to provide communications to dozens, hundreds or even thousands of physical locations where the corporation has a presence, neither BT nor any other provider of global BDS has a physical network that reaches all of the locations of their global corporate customers. This reality is why it is critical that BT be able to purchase on a wholesale basis the access to networks of other telecommunications providers that provide non-substitutable inputs in the form of physical connections to buildings where BT does not itself own such lines, but where BT's global customers have facilities that need to be connected with BT's global communications services.

14. Many global corporations use and require low bandwidth, TDM communications services to meet these needs, making TDM the workhorse in the BDS marketplace and a critical BT offering. This may be because many corporations have legacy

voice TDM-based equipment such as private branch telephone exchange systems, conferencing equipment, and call center equipment, which are interoperable only with TDM access circuits. Or corporations choose to use low bandwidth DS1 TDM circuits because they are a reliable, secure, symmetric, and less expensive alternative than converting to Ethernet-over-Hybrid Fiber Coax ("EoHFC") inputs provided by cable companies and Ethernet-over-Fiber. In other words, TDM circuits get the job done, and often at a better price. The fact that *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****provided to customers in the United States are low bandwidth TDM circuits indicates that there is persistent demand among enterprise customers for this input.

15. In the United States, AT&T and Verizon provide*****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of the low bandwidth TDM access circuits on which BT relies. If, as expected, Level 3 and CenturyLink merge later this year, BT will purchase *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** ("Incumbents"), which will represent *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of our low bandwidth TDM circuits. In addition, and of course, what creates an incentive and ability to price-squeeze or foreclose against BT is the fact that the firms we rely upon for *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****of our low bandwidth TDM circuits are also our largest global competitors. The only thing that has prevented our largest competitors (AT&T and Verizon) from raising their prices *****BEGIN HIGHLY CONFIDENTIAL***** [redacted]

[redacted] *****END HIGHLY CONFIDENTIAL***** has been the FCC access regulations that the *BDS R&O* now eliminates.

16. Before adoption of the *BDS R&O*, while Incumbents charged access prices well above cost to BT and other providers, Incumbents were nevertheless subject to price caps (albeit old, outdated caps) and price controls in many geographic markets, which limited their ability to raise prices for TDM-based access. But after the *BDS R&O* becomes effective, Incumbents can suddenly and permanently increase the prices for BT's *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** low bandwidth TDM circuits in the United States, for which BT already spends *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** even in markets the FCC acknowledges will not be competitive for multiple years. Indeed, the *BDS R&O* permits for the first time Incumbents to wholly eliminate these TDM circuits without providing reasonably comparable alternatives. The *BDS R&O*'s total removal of any price regulation for access to 92% of the buildings in the United States will allow Incumbents to ratchet up already uncompetitive prices for low bandwidth TDM access, which *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** Indeed, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in line with previous Incumbent attempts to move away from BDS.

17. The *BDS R&O* greatly and imminently harms BT because the eliminated price-cap regulations further impede BT's ability to purchase affordable, reliable low bandwidth access inputs in the United States from Incumbents, who effectively are the only suppliers of

such inputs. And, the ability to purchase *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** seeking secure, reliable, and guaranteed communications services to all global locations where a customer is located.

18. Even prior to adoption of the *BDS R&O*, BT *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** In other words, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in providing data network services to our customers in the United States. Our contracts with customers *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** If Incumbents raise prices on TDM circuits or force BT to switch to higher-priced, higher-bandwidth inputs—as we know will happen based on industry discussions and our experience in this market—BT will *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

19. This harm to BT is not speculative and is at our doorstep. Typically, BT's contracts with our corporate customers *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****But BT orders *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** Even now, some of BT's *****BEGIN HIGHLY CONFIDENTIAL***** [redacted]

[redacted] *****END HIGHLY CONFIDENTIAL***** This will *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** would result in *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in the first year. *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** BT cannot rely on *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

20. Because access costs *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** Providing TDM inputs *****BEGIN HIGHLY CONFIDENTIAL***** [redacted]

[redacted] *****END HIGHLY CONFIDENTIAL*****

21. More importantly, the *BDS R&O* threatens *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** As a result of the *BDS R&O*, Incumbents can withdraw these TDM inputs without providing a reasonably comparable alternative. No longer must Incumbents provide a TDM alternative that is comparable in price to a 1.5 Mbps TDM circuit *****BEGIN HIGHLY CONFIDENTIAL**** [redacted] *****END HIGHLY CONFIDENTIAL*****Instead, Incumbents can withdraw TDM and offer an Ethernet-over-Fiber alternative *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** Incumbents will no longer be required to provide an alternative that is comparable in delivery time to the delivery time for a DS1 access circuit, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted]. *****END HIGHLY CONFIDENTIAL***** Instead, they will be able to offer Ethernet-over-Fiber circuits, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****Incumbents will no longer be required to provide an alternative that is comparable in functionality to a TDM circuit capable of supporting TDM-based voice equipment installed at the customer's premises. They can offer Ethernet-over-Fiber service alternatives that would *****BEGIN HIGHLY**

CONFIDENTIAL* [redacted] ***END HIGHLY CONFIDENTIAL***

22. Consequently, BT is ***BEGIN HIGHLY CONFIDENTIAL*** [redacted] ***END HIGHLY CONFIDENTIAL*** Incumbents will be able to ***BEGIN HIGHLY CONFIDENTIAL*** [redacted] ***END HIGHLY CONFIDENTIAL***Indeed, where Incumbents eliminate TDM inputs, ***BEGIN HIGHLY CONFIDENTIAL*** [redacted] ***END HIGHLY CONFIDENTIAL***assuming such alternative, comparable inputs exist. The greater ability of Incumbents to now ***BEGIN HIGHLY CONFIDENTIAL*** [redacted] ***END HIGHLY CONFIDENTIAL***and that ***BEGIN HIGHLY CONFIDENTIAL*** [redacted] ***END HIGHLY CONFIDENTIAL*** Consequently, BT is ***BEGIN HIGHLY

CONFIDENTIAL* [redacted] ***END HIGHLY CONFIDENTIAL***

23. BT will sustain great and irreparable harm *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** The BT customers *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** And at an average cost of *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** This includes *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** This protocol minimizes interruptions of services to customers. It also includes a provision for special construction costs that our supplier charges for extending Ethernet-over-Fiber to a customer location if the service is not already available at the site. Given the process can take *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** it is clear that *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** is a substantial, cumbersome, resource-intensive and lengthy process.

24. I understand that the *BDS R&O* concludes that EoHFC inputs offered by cable companies provide a comparable substitute to Incumbent TDM inputs. But as BT

explained in the underlying docket at the FCC, our experience in the market demonstrates that comparable substitutes to *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** circuits largely do not exist. First, EoHFC inputs from cable companies are less reliable than, and therefore not comparable to, TDM. EoHFC, which provides 99.9% availability, does not meet the 99.99% or 99.999% service availability commitments our customers often demand.

25. While it may not sound like much, the differences among 99.9%, 99.99% and 99.999% availability are significant. 99.9% availability amounts to about eight hours and forty-five minutes of unplanned downtime over the course of a year, while 99.99% and 99.999% availability mean less than fifty-two and five minutes, respectively, of downtime over the same time period. 99.9% availability may be good enough for some enterprise applications, but 99.99% and 99.999% availability are the standards in large enterprise contracting. While there are technological advances that may improve service level availability over EoHFC, and a few enterprises are experimenting with EoHFC for a subset of their needs, customers are not migrating en masse from TDM to EoHFC.

26. Second, based on our preliminary due diligence, and assuming alternatives are available, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

27. The result of these *****BEGIN HIGHLY CONFIDENTIAL***** [redacted]

[redacted]

*****END HIGHLY CONFIDENTIAL*****BT's past experience with regulation in the United States is that major regulatory changes can have *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** For instance, following the approvals of the mergers and vertical integration of AT&T, SBC and BellSouth, and Verizon and MCI between 2005–2008 without adequate regulatory safeguards to protect against the merged entities' greater ability and incentive to discriminate against BT, BT *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** Whereas in the 2000s *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** Furthermore, BT *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

28. Although the United States is the largest and most target-rich market in the global network services marketplace, as a result of the *BDS R&O*'s further tilting of the access playing field in favor of US Incumbents, we *****BEGIN HIGHLY CONFIDENTIAL*****

[redacted] *****END HIGHLY CONFIDENTIAL***** Because the bidding process for *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****as a result of the *BDS R&O* BT must *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****

I declare under penalty of perjury that the foregoing is true and correct.

Executed the 23rd day of June, 2017.

Jennifer Artley

ATTACHMENT B

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF JOSEPH HARDING

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(330) 487-2740 (fax)

June 23, 2017

REDACTED – FOR PUBLIC INSPECTION

DECLARATION OF JOSEPH HARDING

I, Joseph Harding, hereby declare as follows:

1. I am the Executive Vice President and Enterprise Chief Marketing Officer at Windstream, a position I have held since February 2015. I have more than 20 years of experience in the telecommunications industry. In my current capacity I am responsible for all aspects of marketing for Windstream's enterprise business unit. I am over 18 years old and am competent to make this declaration. I submit this declaration in support of Windstream's motion for stay pending judicial review.

2. Windstream is a communications service provider with interests split relatively evenly between incumbent and competitive carrier operations. It is both the fifth largest incumbent local exchange carrier ("ILEC") and one of the largest competitive local exchange carriers ("CLECs") in the nation. Windstream provides advanced communications and technology solutions, including managed services and cloud computing, to hundreds of thousands of business, government, and nonprofit locations throughout the continental United States.

3. Windstream has invested billions of dollars to build and acquire an intra- and inter-city network comprising more than 147,000 miles of fiber across the United States. Like other communications providers, however, to furnish its finished business communications services to its retail customers, Windstream requires the ability to transmit traffic over the "last mile" between a traffic aggregation point and the customer location, known as a channel termination. These last mile connections provide a necessary bridge between Windstream's extensive fiber network and business consumer locations. Business data services ("BDS"), both

based on packet-switched Ethernet and on time-division multiplexing DS1 and DS3 special access lines, which offer guaranteed levels of performance and reliability for data transmitted over the last mile, are essential inputs that enable Windstream and other providers to offer communications solutions to retail customers.

4. Outside of its ILEC service areas, Windstream cannot feasibly build its own last-mile facilities to provide communications solutions to the vast majority of business locations, including the vast majority of its customers' business locations. In particular, for customers of services with bandwidth at or below that of a DS3 (i.e., approximately 45 Mbps), Windstream cannot economically construct its own last-mile facilities in virtually all cases.

5. Where it does not have its own last-mile connections for channel terminations and associated local area transport to customer locations, Windstream usually depends on its access to wholesale BDS inputs to provide a competitive option to business services customers. For customer locations that have lower bandwidth demand, Windstream's options for BDS inputs are usually limited to DS1 and DS3 special access service provided over the last-mile facilities of the ILEC. Although other options, such as local loops provided as unbundled network elements, are sometimes available for Windstream to purchase as an alternative, various contractual, regulatory, and technical constraints limit their availability.

6. Windstream purchases BDS inputs on a wholesale basis through typically multiyear agreements. For DS1 and DS3 services in markets subject to price cap regulation, Windstream may purchase inputs through ILECs' term and volume commitment plans that provide credits against the tariffed rates. Windstream also has wholesale agreements in place for Ethernet-based BDS inputs from ILECs and from competitive fiber-based providers, if available.

7. While Windstream purchases Ethernet-based BDS for some customer locations, those services are not always available or cost-effective, and in many cases customers wish to continue using their existing equipment rather than purchase new equipment that is compatible with Ethernet-based BDS. ILECs' DS1 and DS3 services therefore remain crucial inputs for Windstream to be able to provide lower bandwidth services to business retail customers that want data services at locations where Windstream or other CLECs do not have their own last-mile facilities. DS1 and DS3 services comprise the majority of the wholesale last-mile BDS connections Windstream leases.

8. The cost of DS1 and DS3 BDS inputs needed to reach retail customers, including channel termination and transport, is the largest component of network costs for Windstream's CLEC enterprise and small and medium business ("SMB") segments. As of the end of the first quarter of 2017, this cost accounts for approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of the network interconnection costs for Windstream's CLEC enterprise and SMB businesses, and represents *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of the total costs of those businesses.

9. Given these high costs, the availability of DS1 and DS3 inputs at reasonable rates for any given customer's location is an essential factor in Windstream's ability to offer a competitive solution to that customer. As of the end of the first quarter of 2017, DS1 and DS3 circuit costs (which includes channel termination and mileage charges) account for approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of Windstream's total spend on last-mile access outside of its ILEC territory. Using these wholesale BDS inputs, Windstream provides services to approximately

*****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** enterprise and SMB customer locations around the country.

10. In most cases, Windstream's retail enterprise and SMB customers purchase finished communications solutions pursuant to contracts with multiyear terms, typically three or five years. For potential new customers, Windstream usually will negotiate the rates and terms of the agreements. Given the significance of last-mile access and local transport costs, the prices Windstream is able to offer its potential customer depend on the prices of BDS inputs available to Windstream over the entire term of a customer's service agreement.

11. Many of Windstream's enterprise customers, including government customers, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****. As a result, faced with ILEC price increases on BDS inputs during the term of a contract for services that use those inputs, *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****. Windstream thus must factor in any anticipated DS1 and DS3 input price increases during the term of its contract with an enterprise customer when it initially makes a bid for that contract. In contrast, the ILEC bidding for the same customer contract, as the underlying facilities owner, does not face the risk of increases to its own input costs but can raise the costs for a competitor such as Windstream.

12. Based on the results of the FCC's competitive market test adopted in the *BDS Report and Order*, Windstream estimates that once they take effect, the FCC's new rules would result in the elimination of currently effective price cap protections in *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** counties in which

Windstream operates a competitive provider. These counties also include approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** of Windstream's total DS1 and DS3 circuit costs as of the end of the first quarter of 2017. Approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** Windstream enterprise and SMB customer locations are either entirely or partially located in those counties, which collectively represent approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in recurring revenue on an annual basis.

13. The vast majority of Windstream's DS1 and DS3 purchases in the counties in which price cap regulation will be eliminated are currently made pursuant to term and volume commitment plans. The plans provide discounts, typically as a percentage off of ILECs' tariffed rates.

14. In addition, even in the counties deemed to be non-competitive under the FCC's new rules, transport service will also no longer be subject to price cap protections. Although transport, compared to channel termination, is a smaller component of Windstream's overall costs for BDS interconnection inputs, it still accounted for approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in spend based on annualizing the first quarter of 2017.

15. The FCC's broad deregulation of the markets for DS1 and DS3 special access, including for both channel terminations and transport, will impose significant costs on Windstream that cannot be recovered later, and will undermine Windstream's ability to offer a competitive alternative to customers. The resulting lost revenue cannot be recovered even if the new rules are ultimately invalidated by the court.

16. Although ILECs, including AT&T and Verizon, have not yet announced price increases following the elimination of price caps, nor committed to maintaining rates at current tariffed levels, Windstream expects that the DS1 and DS3 rates in at least some markets will increase as soon as the ILECs are able to do so after the FCC's new rules go into effect on August 1. ILECs that choose to detariff can raise existing tariffed rates without further delay. ILECs that continue to file tariffs during the 36-month transition period may begin raising DS1 and DS3 channel termination prices after 6 months.

17. This expectation is based on Windstream's past experience as a wholesale customer that also offers competing retail services with these ILECs. With respect to Ethernet-based BDS, which is not currently subject to rate constraints under the FCC's rules, ILECs have engaged in price squeezes against Windstream by pricing their wholesale BDS inputs sold to competitive providers close to or even higher than the ILEC's own rates for finished retail communications solutions that use those inputs. Windstream expects that once ILECs are no longer constrained by price cap regulation, they will engage in the same type of practice for DS1 and DS3 channel terminations in counties that are deemed competitive as well as for transport services nationwide.

18. Also, prior to the FCC's suspension in 2012 of its rules allowing for new grants of pricing flexibility, Windstream experienced ILEC price increases routinely if not always following the FCC's grant of pricing flexibility in a given metropolitan statistical area. Windstream expects a similar result in the counties where prices will be deregulated as a result of the new competitive market test.

19. Most recently, just days before the *BDS Report and Order* was adopted, AT&T announced that 10 and 15 percent price increases for certain intrastate private line DS3 services

would take effect "on or after" the date of the Commission's scheduled vote. While these intrastate private line services are not subject to the *BDS Report and Order*, this drastic price increase affecting seven states further demonstrates that ILECs, where insufficiently constrained by regulation, can—and will—raise prices on DS1 and DS3 services.

20. Further destabilizing prices is the potential for DS1 and DS3 prices to increase immediately after the new rules go into effect if ILECs detariff, which they are permitted to do at any time under the new rules. ILECs' term and volume commitment plans provide discounts to the wholesale customer through various mechanisms that most commonly result in a percentage of the tariffed rate that is either reduced or credited to the customer. The plans require a minimum number of purchases at *tariffed* rates to effect these discounts.

21. However, if an ILEC detariffs prior to the end of the term of the volume commitment plan, the continued validity of the agreed-upon prices in the commitment plans would be in doubt. Windstream expects that ILECs will take the position, one with which Windstream disagrees, that immediate detariffing relieves the ILECs' of their contractual obligation to maintain existing tariffed rates referenced in the term and volume commitment plans for the duration of the terms of those plans. In addition, I understand that although the Order placed a freeze on tariffed channel termination rates for a period of 6 months from the effective date of the new rules, that freeze would not apply if an ILEC were to detariff voluntarily within that 6-month timeframe. To Windstream's knowledge, none of the large ILECs—AT&T, Verizon, CenturyLink, and Frontier—has committed to maintaining its tariffs for the full term of its respective term and volume commitment plan or otherwise shown any willingness to renegotiate these commitments.

22. The prospect of rate increases creates uncertainty over the short- or even medium-term for inputs, which will raise the prices of the communications solutions in Windstream's bids for prospective customers and current customers whose contracts are up for renegotiation.

23. Windstream estimates that approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** enterprise and SMB customer locations either entirely or partially in a county that will lose rate protections under the FCC's new rules, will need to be renegotiated within the next 12 months. These contracts represent approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in recurring revenue on an annual basis.

24. In the absence of the FCC's new BDS rules, Windstream would have projected, based on past performance, to enter into approximately *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** new contracts over the next 12 months in the newly deregulated markets, representing a projected *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** in recurring revenue on an annual basis. The specter of significant increases in DS1 and DS3 input prices over the next 12 months will force Windstream either to forgo bidding or to submit higher bids for new or renegotiating customers, and to increase the rates for customers that are on month-to-month arrangements, where the customer contract allows Windstream to do so.

25. Either way, increases in the costs of DS1 and DS3 inputs in the newly deregulated counties put Windstream at a severe competitive disadvantage compared to the large ILECs. These ILECs will not face the same cost pressures because they are the owners of the underlying last-miles facilities, which have been fully or near fully depreciated. Mirroring their current practices with deregulated Ethernet inputs, the large ILECs will use their control of the pricing of

DS1 and DS3 inputs to raise Windstream's costs of serving retail customers compared to the ILECs' own costs, squeezing Windstream's margins and prices and pushing it out of the market.

26. This problem is particularly acute for *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** located either entirely or partially in newly deregulated markets. *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** The pricing instability caused by the FCC's new rules, and Windstream's expectation of higher input costs, mean that Windstream *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****.

27. As a result, Windstream expects to *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL*****. Because the lost customers will enter into multiyear contracts with another provider—most likely the ILEC—Windstream would not be able to recoup revenue lost during the pendency of this appeal or prevent ongoing lost revenue from those customers. Moreover, for current retail customers that have contractually locked in rates, Windstream will also fully absorb the loss caused by increases in DS1 and DS3 input costs for the duration of those contracts, which Windstream estimates to be *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** over 12 months on a 20% increase in input costs. In both cases,

Windstream would not be able to recover those losses even if the FCC's rules are invalidated by a court on review.

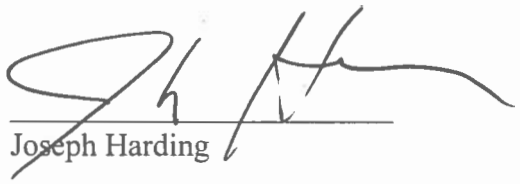
28. In addition to driving price increases for its retail products, the expectation of higher BDS input costs will also cause Windstream to reevaluate its ability to remain in certain markets. *****BEGIN HIGHLY CONFIDENTIAL***** [redacted] *****END HIGHLY CONFIDENTIAL***** In such markets, customers of lower bandwidth services in particular will be affected because the limited revenue potential of these customers cannot economically support the extension of competitive fiber facilities to their locations.

29. The competitive disadvantage caused by the ILECs' anticompetitive pricing power, which will be magnified by the FCC's new rules, harms Windstream's ability to compete effectively not just in the newly deregulated markets. Lost revenue and lower market share will further force Windstream to reduce staff and other resources, and to forego investments in its network, all of which will injure Windstream's position in the market and reduce customers' competitive choice of service provider. These effects of these harms will remain and continue even if the FCC's new rules are set aside by the court.

REDACTED – FOR PUBLIC INSPECTION

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on: June 22, 2017



Joseph Harding

ATTACHMENT C

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF DAVID J. MALFARA, SR.

I, David J. Malfara, Sr., hereby declare:

1. My name is David J. Malfara, Sr. I am over the age of 21, and I am competent to make this declaration. I make this declaration in support of the motion of COMPTEL d/b/a INCOMPAS ("INCOMPAS") for stay pending judicial review of the Federal Communications Commission's Business Data Services Report and Order ("*BDS R&O*"). The matters cited in this declaration are based on my personal knowledge, information, and belief, and if called to testify, I could and would testify to the same effect.

2. I have been an active participant in the continuing evolution of the telecommunications industry for more than 30 years. Currently, I am President/CEO of ETC Group, LLC ("ETC Group"), a business management and engineering consulting company founded in 2008. ETC Group specializes in advising communications service providers, among others, on issues related to the management, operation and deployment of emerging strategies

and business models based on the introduction of new technologies. Additionally, I am retained by INCOMPAS as a subject matter expert on matters of emerging technology and service provider business models, and I am a Council Member of Gerson Lehrman Group, Inc. ("GLG"), providing subject matter expertise to GLG's capital markets clients on telecommunications and broadband industry issues.

3. Previously, I served for over 10 years as a Director, and for 5 years on the Executive Committee, of INCOMPAS, and chaired the association's Technology Task Force. I also founded and served as the President, Chief Executive Officer, and/or Chief Technology Officer for numerous competitive local exchange carriers, including Remi Communications Holdings, LLC, Z-Tel Network Services, Inc., and Pennsylvania Alternative Communications, Inc. (d/b/a Pace Long Distance and Pace Network Services).

Background

4. Business data services ("BDS") provided by incumbent local exchange carriers ("ILECs") have long been used by competitive providers as a mechanism to bring innovative, low-cost communications services to commercial subscribers, where direct subscriber connection to the competitive provider's network is either not economically or technically feasible. In this capacity, BDS functions as an important "stepping stone" for subscribers and competitive carriers alike in reducing the risk of deployment when the demand for a new service or the viability of a new market cannot be quantified, and so the cost of facilities-based deployment would present an unacceptable risk.

5. ILEC BDS performs this valuable role because in region, ILEC BDS is ubiquitously available and generally the *only* way to reach the subscriber for which it is used. Functioning in this way, ILEC BDS acts not only as a near-term solution for subscriber

connectivity, it provides a means for competitive providers to quickly bring innovative, and often unique and customized, services to subscribers in entirely new markets well ahead of any possible network facilities deployment.

6. The *BDS R&O* puts these strategies at risk by removing price-cap regulation for low bandwidth, time-division multiplexing ("TDM") inputs (or circuits) and eliminating the previous requirement that incumbent telecommunications companies provide reasonably comparable telecommunications inputs when they retire or eliminate existing TDM access circuits. These effects will cause increases to the costs to competitive carriers in providing their services, and lead to an immediate decrease or, worse, *elimination* of competition for commercial communications services, such as voice, video teleconferencing, cloud, private virtual networking and Internet access services, in certain markets where the use of ILEC BDS as a wholesale input to a competitor's retail service is necessary. Less competition in the retail market leads to increased prices, less choice, decreased innovation and customization, and lower quality services for commercial subscribers, harming these customers. This harm to commercial communications subscribers is direct, immediate, and significant.

7. The *BDS R&O* directly and significantly harms commercial subscribers by: (1) reducing competitive carrier expansion into new markets; (2) reducing carrier choice for multi-location commercial subscribers; and (3) preventing smaller commercial subscribers from accessing advanced communications technologies. These harms will occur immediately upon the effective date of the *BDS R&O*.

Reduced Competitive Expansion – Longer Broadband Deployment Timeframes

8. Competitive carriers often use ILEC BDS as a surrogate for their own facilities in order to test their acceptance by potential subscribers in new markets. Using ILEC BDS, they can test-market their product portfolio in the new area without incurring the capital

expense and build-out timeframes necessary to support a facilities-based model. If the market proves successful, the carrier can displace these ILEC BDS facilities with their own network facilities, confident in the knowledge that the market finds their product portfolio attractive enough to hit their market-share goals. Without affordable ILEC BDS, this "stepping-stone" test-marketing strategy would not be possible.

9. Competitive carriers prioritize new markets by the cost of market entry and the time necessary to build a substantial enough subscriber base to support the deployment of its own network facilities. Markets with lower ILEC BDS pricing are more attractive to competitive entrants because these carriers may be able to reach subscribers at a lower cost and, thereby, quickly capture enough market share to support their own network build-out. These early subscribers are able to enjoy the lower price and availability of the entrant's product portfolio far earlier than would otherwise be possible, solely because ILEC BDS provides an acceptable means of delivery.

10. Markets with somewhat higher ILEC BDS pricing occupy a proportionately lower priority in competitive expansion plans because the retail price of service in those markets may need to be adjusted upward (covering more of the ILEC BDS cost). Higher retail prices, of course, negatively affect subscriber acquisition in both sales cycle time and volume, increasing the carrier's risk of market entry.

11. The *BDS R&O* will cause the cost of ILEC BDS to go up. If the price of deregulated ILEC BDS services should increase 10% over current rates, I believe the effect will be manifested in a slowdown of competitive new market entry, as the focus shifts to harvesting greater market share in markets where the competitor has already deployed its own network facilities. Should the rates soar by 25%, I would expect the use of ILEC BDS as a competitive

market entry tool to stop and for service providers to immediately adjust retail pricing upward for current subscribers served by ILEC BDS facilities.

12. At rates 50% or higher than current ILEC BDS rates, I believe competitive carriers will begin to exit certain immature markets where facilities-based network deployment is not imminent. The result to commercial subscribers in those markets (and other markets not yet considered for entry) is that the market itself may suffer higher prices because the entry risk is simply too high for competitors to absorb and, therefore, the ILEC's service and pricing remains unchallenged. Competitive expansion will be slowed significantly and may not happen in certain markets at all. Because competitive carriers will need to adjust their business models and expansion plans immediately upon the effective date of the *BDS R&*O, this harm to retail subscribers served with ILEC BDS facilities is also immediate.

Multi-Location Commercial Subscribers May Not Have Competitive Choice

13. Competitive carriers offer multi-location subscribers optimized pricing based on scale economies. Global corporations require communications services to be provided at dozens, hundreds or even thousands of physical locations where the corporation has a presence, however, no provider of global or domestic service has a physical network that reaches all of the locations of their global or national domestic corporate customers. Such providers supplement their own facilities with ILEC BDS services to reach those off-network subscriber locations.

14. Multi-location subscribers often have modest requirements in their satellite locations. A healthcare institution, for example, may comprise 2-3 large hospitals, 30-40 out-patient clinics, and 10 or more testing labs. These facilities are usually dispersed throughout a wide geographic territory to provide uniform health services to patients in urban, suburban, and rural areas of the served community. The hospitals may reside within the urban

area, or on the urban/suburban edge, with the out-patient clinics and testing labs located in the suburban and rural areas of the served community.

15. A competitive service provider network may cover the urban area completely, suburban areas at 80%, and rural areas at 40%. In such cases, ILEC BDS may be used to provide the last-mile reach to the off-network locations. Even under current rules, if affordable ILEC BDS is not available for even a small number of these outlying locations, the cumulative impact may be sufficient to deter the competitor from bidding on the healthcare institution's multi-location contract at all.

16. Post-effective date of the *BDS R&O*, increases in the cost of ILEC BDS resulting from deregulation would certainly foreclose such subscribers from almost all competitive options. The reality is that, even though competitors may exist in any given market, they are not ubiquitous. In such cases, absent affordable ILEC BDS, multi-location subscribers such as the healthcare institution in this example may not have a single competitive alternative to the ILEC because of the need to support satellite offices where only ILEC facilities exist.

Smaller Business Subscribers May Be Shut Out of Advanced Communications Technologies

17. Many ILECs choose to offer services based on advanced technologies only to larger commercial subscribers. A case in point is Ethernet service. Most ILECs choose not to use Ethernet-over-TDM and TDM bonding technologies, which are capable of supporting Ethernet on TDM facilities at speeds up to 100Mb/s. Instead, ILECs choose to offer Ethernet services only over optical fiber facilities at far higher transmission rates, commanding far higher minimum prices. By limiting Ethernet availability in this way, ILECs can ensure that the overhead cost of customer support for advanced services such as Ethernet is justified by the high "average revenue per user" commanded by such service.

18. Conversely, competitive carriers are willing to employ these TDM-based technologies in order to provide a "stepping stone" approach to allow subscribers to grow at their own rate. Affordable ILEC BDS allows competitors to provide these subscribers with what is often their first access to advanced Ethernet services at entry-level prices where, absent the competitive offering, they would have no access to such services at all. Later, as these subscribers grow, fiber deployment to their location may be justified by their increased demand. Rather than being forced to absorb the high entry cost of fiber service capacities they cannot use, these subscribers are afforded the opportunity to "right size" their service, while still taking full advantage of the increased business efficiencies made possible by advanced communication services such as Ethernet.

19. Additionally, ILECs often offer their advanced, unified communication services using a pricing structure that demands a high fixed monthly fee plus an incremental cost per user. In many cases, the high fixed monthly fee places the ILECs' service out of the reach of smaller businesses. Competitive carriers, on the other hand may offer the equivalent advanced, unified communication service at a somewhat higher monthly cost per user but without the fixed monthly fee.

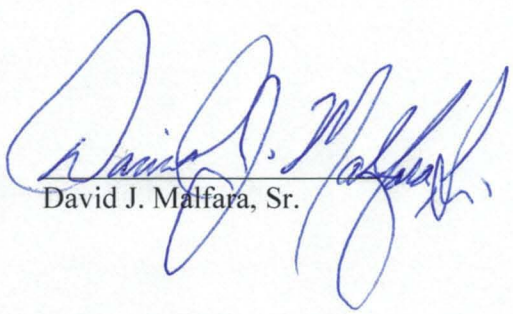
20. Because the *BDS R&O* will result in an immediate increase in the costs of ILEC BDS to competitive carriers, these competitive carriers must begin taking immediate remedial actions, including refraining from targeting smaller commercial subscribers. The resulting harm to these smaller commercial subscribers—the lack of an alternative to the ILECs' more expensive, less beneficial service offerings and service model—is also immediate.

Conclusion

21. The *BDS R&O* poses immediate and significant financial and operational risk to commercial subscribers. By any measure, the *BDS R&O* results in increased costs to competitive carriers in providing their services to commercial subscribers. These costs are directly and indirectly passed along to such subscribers, preventing them from accessing critical, affordable competitive services. In addition, to the extent that competitive carriers exit the market, commercial subscribers in that market will not be able to purchase and benefit from these unique and valuable service offerings, based on both pricing and non-pricing availability metrics, which these competitive carriers provide.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 23rd day of June, 2017.



David J. Malfara, Sr.

ATTACHMENT D

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Business Data Services in an Internet Protocol Environment	)	WC Docket No. 16-143
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

DECLARATION OF [DECLARANT]

I, Susan M. Gately, hereby declare:

1. My name is Susan M. Gately. I am over the age of 21, and I am competent to make this declaration. I make this declaration in support of the Motion for Stay Pending Judicial Review of the Federal Communications Commission's Business Data Services Report and Order ("*BDS R&O*") filed by the Ad Hoc Telecom Users Committee ("Ad Hoc"). The matters cited in this declaration are based on my personal knowledge, information, and belief, and if called to testify, I could and would testify to the same effect.

2. I am President of SMGately Consulting, LLC ("SMGC"), 84 Littles Avenue, Pembroke, MA 02359. SMGC is a consulting firm specializing in telecommunications, economics, and public policy. I am an economic and policy expert specializing in the telecom arena with more than thirty years of consulting experience.

My specific experience lies in the areas of telecom industry structure; telecom services and network management practices; regulatory regimes; cost development; pricing and rate structure; and access charges.

3. Prior to founding SMGC, I was a partner in and the Senior Vice President at Economics and Technology, Inc. ("ETI"), providing advice, litigation support, expert testimony, white papers, and in-house training and education to ETI's myriad carrier, governmental agency, and large business clients. I have provided expert testimony on a variety of telecom policy matters and participated in hundreds of FCC proceedings since 1981 on access charges, universal service, separations and cost accounting, and forms of regulation. I have appeared as an expert witness in state proceedings before state public utility commissions.

4. I have been involved in the analysis of incumbent LEC intrastate and interstate access tariffs since the inception of those tariffs in 1984. I have participated in virtually every major FCC proceeding on access charges and price caps. I am among the nation's leading experts on access charge rate structure, methodology, and policy. Access issues I have addressed in hundreds of submissions to the FCC include access service pricing and rate structures, price caps implementation, access service costs (including cost allocation of regulated and non-regulated services), and alternative forms of regulation. I undertook a detailed analysis of the data filed in response to the FCC's first "voluntary data request" in its special access or "BDS" proceeding in Docket 05-25 in 2013 and most recently of the data filed in response to the "mandatory data request" that followed in the above named proceedings.

5. I have served as an economic advisor to and subject matter expert for the Ad Hoc Telecom Users Committee since the early 1980s. In that capacity, I have reviewed and analyzed information regarding pricing, network architecture, contractual terms and conditions, applications, cost allocations, and cost recovery by telecommunications service providers on behalf of hundreds of business customers, including the members of the Ad Hoc Telecom Users Committee. On behalf of those business customers, I have also analyzed their internal network architectures, costs of service, and cost recovery. As a result, I am familiar with the services that business customers purchase and how they are used in furtherance of the customers' business plans.

6. **"**Business Data Services" ("BDS") is the FCC's latest terminology for a group of telecommunications services that are, and for decades have been, the fundamental building blocks of corporate networks. Formerly known as "special access," BDS services include all of the "private lines" or "point-to-point connections" that business customers use for their internal corporate networks, for their external communications with their customers, and to deliver their products to their customers. Virtually every critical business activity – withdrawals from a bank's ATM, credit card "swipes" at merchants' point-of-sale terminals, toll-free calls to customer service centers, data collected by regional offices, damage assessments recorded by insurance agents, inventory reports by car dealerships or retailers, voice and video conference calls among employees – all of these critical business activities can only be done via BDS facilities. For all types of businesses in all types of industries, BDS facilities are

the long-standing and essential ingredients of the networks used to communicate internally and deliver services to customers.

7. Business rely on a broad range of services. The largest companies in the country still depend upon some of the smallest capacity services offered by the incumbent local exchange carriers ("ILECs"). In particular, business users still rely heavily on DS1 connections for service to low-volume locations. I have, for example, advised an insurance company that uses at its headquarters campus an OC-192, which is a fiber-based facility with enough capacity to handle the equivalent of about 130,000 voice lines. But it also buys about 18,000 DS1 circuits to connect to the offices of its agents around the country. Similarly, credit card issuers purchase very high capacity BDS for their data centers but depend upon the lowest capacity data circuits for the millions of merchant point-of-sale terminals at which their cardholders "swipe" their cards. Thus, the FCC's decision to eliminate rate protections for customers of DS1/DS3 BDS, in the apparent belief that those services no longer play a critical role for business customers, is simply misguided and misinformed.

8. The Commission has already allowed customers to be exploited for too long by unjust and unreasonable rates while this rulemaking has been pending. In January, 2002, Ad Hoc was the first party to sound the alarm when ILECs began taking advantage of the Commission's flawed pricing flexibility rules by raising their rates for "special access," as business data services were then known.[1] Nine months later, AT&T filed its petition "essentially requesting that the Commission revoke the pricing

[1] Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, CC Docket No. 01-321 (filed January 22, 2002) at 3-6.

flexibility rules and revisit the CALLS plan" which had set the rates that price cap ILECs charged for BDS.[2] Three years and a mandamus petition later,[3] the Commission finally opened this rulemaking. Now, after more than a decade – and 15 years after Ad Hoc first flagged the issue – the Commission has finally adopted regulatory reform for BDS. But its latest order does nothing to protect business customers from unjust and unreasonable rates.

9. The Commission's failure to regulate BDS prices in non-competitive areas has allowed price caps ILECs to exploit customers with rates that have been excessive for years. The magnitude of the resulting overcharges that purchasers of BDS have been paying is quantifiable and patently unreasonable. In an August 2004 analysis filed by Ad Hoc in this docket, I estimated that special access prices were set at levels that were generating about $15 million per day beyond what would have been expected in a competitive market.[4] In comments filed by Ad Hoc in July 2016, I pointed out that this amount added up to more than $64 billion in overcharges imposed on BDS customers.[5]

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[2] *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services,* WC Docket No. 05-25, RM-10593, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("2005 NPRM") at 2002, para. 19.

[3] A*T&T Corp., et al.*, D.C. Circuit Case No. 03-1397, Petition for a Writ of Mandamus (filed Nov. 6, 2003).

[4] Susan M. Gately, Helen E. Golding and Lee L. Selwyn, *Competition in Access Markets: Reality or Illusion: A Proposal for Regulating Uncertain Markets, Ex Parte* Submission of the Ad Hoc Telecommunications Users Committee in RM-1059 (filed August 26, 2004) at 7-8.

[5] *See* Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593 (filed July 13, 2016) at 8. This figure is a conservative estimate since it assumed that the level of overcharges had remained constant over time since 2003. In fact, the per day overcharge grew since that time as a result of increased price levels, increased volumes of sales, and efficiency enhancements that were not captured because of the Commission's failure to reset the price caps X-factor when the CALLS plan expired. In addition, the figure of $15-million per day was calculated using ILEC year-end 2003 results. Ad Hoc updated the amount to $17.5-million per day using 2004 year-end data and to $21-

10. In short, both the direct experience of business customers and the evidentiary record before the FCC in this docket demonstrate that BDS prices will go up absent a stay. As Ad Hoc has repeatedly reported to the FCC and as the evidence in the record confirmed, the ILECs have consistently responded to BDS de-regulation by raising their prices. As the Commission's own tariffs document, ILECs raised prices in "pricing flexibility" areas above the levels the FCC's price caps rules identify as just and reasonable.[6]

11. The FCC's statutory responsibility under the Communications Act is to protect customers from unjust and unreasonable rates The Commission itself has declared that its job is to preserve "the principles embodied in the Communications Act that have long defined the relationship between those who build and operate networks and those who use them."[7] One of these principles, one of the Act's "core statutory values as codified by Congress," which the Commission has declared it must preserve as it facilitates and encourages market-driven technological transitions in network technology, is consumer protection.[8] In order to vindicate that core statutory value, the Commission must protect customers from the ILECs' market power in the business data services ("BDS") market, pending the emergence of competition in the BDS market.

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million per day using 2007 year-end data. (The year 2007 was the last year for which accounting data allowing such calculations was collected). *See* Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593 (filed June 13, 2005) at 4; Susan Gately, Helen Golding, Lee Selwyn and Colin Weir, *Longstanding Regulatory Tools Confirm BOC Market Power: A Defense of ARMIS,* Attachment B to Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-25, RM-10593 (filed January 19, 2010), Appendix 1.

[6] *See, e.g.,* Comments of the Ad Hoc Telecommunications Users Committee on the NPRM, WC Docket No. 05-25, RM-10593 (filed June 13, 2005) at 18-24.

[7] *See Technology Transitions et al.*, GN Docket No. 13-5 et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433 (2014) at 14969, para. 1.

[8] *Id.* at 1435, para. 1.

Until that occurs, the Commission can and must protect customers from unjust and unreasonable rates, which the BDS order does not do.

12. In light of past experience with BDS pricing by ILECs and the dependence of businesses on those BDS services, either as ILEC customers or customers of competitive carriers that rely on ILEC BDS inputs, the effect of this Order will be to diminish competition to the detriment of business customers by hampering the ability of competitive carriers to compete. Based on my experience, diminished competition, including the withdrawal of competitive carriers from market segments, will lead to business customers paying higher prices and suffering the other harms that come from a lack of robust competitive choices, such as a decrease in the quality of services and less innovation in the creation of new services.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Pembroke, Massachussets on the 23rd day of June, 2017.

Susan M. Gately